UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CORRECTED COPY
(Filed and Served July 1, 2008)

- -X
UNITED STATES OF AMERICA,

Plaintiff,

- against-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.
- -X

Civil Action No.
CV-05-3212

(Glasser, J.)
(Pohorelsky, M.J.)

THE UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The United States commenced this action to eradicate the pervasive and long-enduring Waterfront racketeering that has deprived the honest membership of the International Longshoremen's Association ("ILA"), the innocent beneficiaries of the ILA's principal pension and welfare funds, businesses, and others, of rights and property for decades.

Past prosecutions and convictions, including those in United States v. Gotti, et al., No. 02 Cr. 606 (E.D.N.Y. 2004) (FB), United States v. Bellomo, No. 02 Cr. 140 (S-2) (E.D.N.Y.) (ILG), and United States v. Coffey, et al., No. 04 Cr. 651 (E.D.N.Y. 2005) (ILG), have demonstrated the profound durability of organized crime's infiltration of the Waterfront. This history establishes the need for broader relief than is possible through criminal prosecution alone. Accordingly, this case seeks relief against both the leaders of the Waterfront Enterprise, as well as its institutional components, including the ILA, MILA, and the METRO Defendants.

The scope of the United States' pleading, which is admittedly extensive, simply reflects the breadth of Waterfront racketeering itself. As shown below, the Complaint, as amended subsequent to the Court's November 1, 2007 Memorandum and Order, properly states both a substantive RICO claim and a claim for RICO conspiracy, and does so in a manner that comports will the applicable law. As such, Defendants' motions to dismiss are without merit, and should be denied in all respects, and this case permitted to proceed.

STATEMENT OF FACTS

The United States expressly incorporates the facts set forth in the Second Amended Complaint, some of which, together with other facts of record in this case to date, are summarized below.

A. THE WATERFRONT ENTERPRISE

The Waterfront Enterprise is "a group of individuals and entities associated in fact (hereinafter, the "Waterfront Enterprise" or "Enterprise"), as defined in 18 U.S.C. § 1961(4)," specifically: "the ILA and ILA Locals 1, 1804-1, 1814, 1922, 1922-1, and 2062; current ILA Executive Officers John Bowers, Robert E. Gleason and Harold J. Daggett; former ILA Officers Albert Cernadas, Arthur Coffey and Frank "Red" Scollo; MILA, the ILA Local 1922 Health and Welfare Fund, the ILA-Employers Southeast Florida Ports Welfare Fund; METRO and the METRO-ILA Funds; members and associates of the Genovese and Gambino crime families, particularly Anthony "Sonny" Ciccone, Jerome Brancato, and James Cashin," together with other Co-conspirators not named as Defendants. SAC ¶ 72.

The purpose of the Enterprise is, and has been, to obtain money or other property on the Waterfront and the Port of Miami through extortion or fraud. Specifically, it has been and remains the purpose of the Enterprise to seek and obtain access to and control over: (a) ILA union positions, wages, and accompanying employee benefits, from the membership of the ILA; (b) the rights of the ILA membership to democratic participation in union affairs; (c) the rights of the ILA membership to the honest services of the ILA's officers, agents, delegates, employees and representatives; (d) money and economic benefits in benefit plan transactions from ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries; (e) the rights of ILA-sponsored pension and welfare benefit funds and the funds' participants and beneficiaries to the honest services of benefit plan trustees and fiduciaries; and (f) money from businesses. SAC ¶ 73.

Each member of the Enterprise has been essential to the Enterprise's functioning and the achievement of its goals. The New York-based Genovese and Gambino families of La Cosa Nostra ("LCN"), through their members and associates, control or otherwise corruptly influence the ILA, which is headquartered in New York City.[1] The LCN families effect this control through high-ranking officers of the ILA, who have obtained and maintained their positions within the ILA through the sponsorship and support of the two LCN families. Although these ILA officers hold positions of trust relative to the ILA membership, they breach their fiduciary duties to the membership, depriving the membership of money and rights. The two families reach accommodations as to which of their respective associates will occupy ILA officers positions. SAC ¶ 75.

This arrangement is possible because the LCN-associate ILA officers occupy the most important positions within the ILA, including Executive Officer positions atop the ILA's governing Executive Council. They make or influence all key decisions of the ILA, both at the International level and at the level of ILA locals operating on the Waterfront and the Port of Miami, where they have served as officers of key locals. This includes the selection of ILA officers who receive the substantial salaries and benefits that come with these positions. As a result, the LCN-associate officers are able to facilitate placement of other LCN associates in ILA officer positions. SAC ¶ 76.

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[1] This shared control was proven in. Gotti, as recognized by the Second Circuit in its decision upholding the convictions of Waterfront racketeers in that case. See United States v. Gotti, 459 F.3d 296, 302-303 (2d Cir. 2006).

The LCN-associate ILA officers are typically trustees on the boards of pension and welfare benefit funds that are jointly managed by the ILA and management for the benefit of fund participants. These benefit funds include MILA, the ILA's largest and most important welfare fund, as well funds managed for the benefit of ILA members in certain locals on the Waterfront and in the Port of Miami that do not participate in MILA, namely the METRO-ILA Funds, the ILA-Employers Southeast Florida Ports Welfare Fund, and the ILA Local 1922 Health and Welfare Fund. As fund trustees, these ILA officers greatly influence the management and operation of the funds, including the award of vendor contracts by the funds. As a result, the ILA officers are able to rig the award of fund vendor contracts to companies associated with LCN. SAC ¶ 77.

Influence over the ILA and its benefit funds thus enables access to lucrative union jobs, access to benefit fund money in the form of vendor contracts, and the ability to control rank and file members of the ILA, all at the expense of the rights of the ILA's members, both as union members and benefit fund participants. Control of ILA labor also enables the extortion of Waterfront businesses and businesses within the Port of Miami that pay for "labor peace" to avoid any disruptions in their operations. SAC ¶ 78.

On the Waterfront, control of ILA locals, as well as businesses that employ members of the ILA locals in Manhattan, Brooklyn and Staten Island, and New Jersey, has been geographically apportioned between the two crime families. Although there has been overlap and competition, by longstanding agreement and practice, the Genovese family and its ILA and ILA-Fund associates have controlled Manhattan and New Jersey. See United States v. Gotti, 459 F.3d 296, 302-303 (2d Cir. 2006). The Gambino family and its ILA and ILA-Fund associates have controlled Brooklyn and Staten Island. This shared control has extended to METRO, the association of Waterfront employers in the container repair and maintenance industry. METRO members employ ILA labor throughout the Port of New York/New Jersey and METRO jointly manages the METRO-ILA Funds with ILA Locals 1804-1 and 1814. Control of METRO has further assured LCN control of the METRO-ILA Funds, particularly because METRO and the METRO-ILA Funds have interlocking administrative functions and operations and share key employees, including employees who have obtained their positions through the influence of the Genovese and Gambino families. Additionally, control of METRO has enabled LCN access to well-paid positions within METRO, and its affiliated funds, including "no-show" jobs. SAC ¶ 79.

B. THE INDIVIDUAL DEFENDANTS

1. Individual ILA Officers: Present and Former

The Complaint identifies two categories of individually named defendants: those who have violated RICO and conspired to violate RICO, and those who are named in their official capacities as fiduciaries whose participation is necessary to effect the full relief sought in this action.

a. *Racketeering Defendants*

Each of the following current and former members of the ILA's governing Executive Council and members of the Waterfront Enterprise is a Genovese family associate who has engaged in racketeering activity. As a *quid pro quo* for their allegiance to organized crime, these Defendants have received high salaries and substantial benefits from the ILA membership to whom they owe fiduciary duties which they have breached.[2]

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[2] As ILA officials, these Defendants owed a fiduciary duty to the membership of the ILA. Section 501 of the Labor Management Disclosure Act of 1959 (LMRDA), codified at 29 U.S.C. § 501(a), provides, in pertinent part, as follows:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its

Defendant John Bowers has served in various high-ranking positions of the ILA for decades, serving as President from 1987 until July of 2007, at which time he took on the post of President Emeritus. SAC ¶ 18. Prior to his election as ILA President in 1987, Bowers served as Executive Vice-President of the ILA, the second highest union position in the ILA, for twenty-four years. At all relevant times, Bowers has been President of the ILA's Atlantic Coast District and President of ILA Local 824. At all relevant times, he has also been a member of the MILA Board of Trustees, a member of the Board of Trustees and fiduciary of the funds jointly managed by the ILA and the New York Shipping Association ("NYSA-ILA Funds"). At one point, Bowers was President of ILA Locals 1809 and 1909. Bowers was an unindicted co-conspirator in United States v. Coonan, et al., No. 87 Cr. 249 (WK) (S.D.N.Y. 1989), aff'd, 876 F.2d 891 (2d Cir. 1989) (Table), cert. denied, 493 U.S. 975 (1989), in which the United States proved, *inter alia*, that the Westies, associates of the Gambino family, had conspired to extort money from officials of ILA Locals 1909 and 1809 and in furtherance of that conspiracy had murdered ILA Local 1909 official Vincent

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> members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. § 501(a). In United States v. Local 1804, International Longshoremen's Association, the district court ruled that this duty was an affirmative one, and that it included the duty to investigate corruption. 812 F. Supp. 1303, 1339 (S.D.N.Y. 1993) (LBS).

Similarly, whether Trustees of MILA, the METRO-ILA Funds, or the Local 1922 and Southeast Florida Ports Funds, each of the ILA racketeering Defendants had "a fiduciary duty that was set forth in ERISA, including discharging their responsibilities for the best interests of the Funds and without conflict of interest." United States v. Coffey, 361 F. Supp. 2d 102, 117 n.14 (citing 29 U.S.C. §§ 1101, 1104 and 1106).

Leone.

Harold J. Daggett is the Executive Vice-President of the ILA, and President of Local 1804-1. Until July, 2007, Daggett was the Assistant General Organizer of the ILA and a member of Defendant MILA Board, as well as a member of the Board of Trustees of NYSA-ILA Funds. A criminal complaint was filed against Daggett in the Eastern District of New York, and he was indicted for extortion conspiracy and mail and wire fraud conspiracy concerning the ILA. United States v. Coffey, et al., No. 04 Cr. 651 (E.D.N.Y. 2005) (ILG). On November 8, 2005, Daggett was acquitted of the charges in the indictment. SAC ¶ 19. During this trial, Daggett testified that convicted Waterfront racketeer Andrew Gigante was "a damn good man" and that, in thirty-eight years in the ILA, he had never heard of the Genovese family on the piers. SAC ¶ 70. By virtue of his elevation to the position of Executive Vice President, Daggett is now poised to become ILA President, without so much as a vote of the ILA membership. SAC ¶ 70.

Defendant Robert Gleason, who committed two of the racketeering acts alleged in the Complaint, obtained his job with the ILA because he is the son of former ILA President, and long-time Genovese family associate, "Teddy" Gleason. Robert Gleason is the Secretary-Treasurer of the ILA. SAC ¶ 20. Robert Gleason is also the former Secretary-Treasurer of the ILA's Atlantic Coast District Council and, at one point, was Secretary-Treasurer of ILA Local 1809. Gleason is a member of Defendant MILA Board, and a member of the Board of Trustees of one or more of the NYSA-ILA Funds. Through May 2003, Gleason was the ILA-appointed trustee of Local 1814.

Arthur Coffey, is a former Vice-President of the ILA, former Vice-President of the ILA's South Atlantic & Gulf Coast District, and former President of ILA Locals 1922, 1922-1 and 2062. Coffey was a member of Defendant MILA Board and a trustee of the ILA Local 1922 Health and Welfare Fund as well as the ILA-Employers Southeast Florida Ports Welfare Fund. SAC ¶ 21. Coffey obtained his job with the ILA through the intercession of George Barone and Douglas Rago, long-time Genovese soldiers, former ILA officials, and Waterfront racketeers. SAC ¶ 89. A criminal complaint was filed against Coffey in the Eastern District of New York, and he was indicted for extortion conspiracy and mail and wire fraud conspiracy concerning the ILA. United States v. Coffey, et al., No. 04 Cr. 651 (E.D.N.Y. 2005) (ILG). On November 8, 2005, Coffey was acquitted of the charges in the indictment. SAC ¶ 21.

b. *Other ILA Officer Defendants*

The remaining ILA-officer Defendants as to whom the United States seeks necessary relief include: President Richard P. Hughes, Jr, General Vice President Benny Holland, Jr., General Organizer Gerald Owens, and Assistant General Organizer John D. Baker. Hughes, Holland and Owens are also members of the MILA Board. SAC ¶¶ 22-25. The Complaint also names as nominal Defendants twenty-five ILA Vice-Presidents who are on the Executive Council. SAC ¶ 26. According to testimony given by Gambino associate and former ILA Vice-President Frank Scollo in United States v. Gotti, No. 02 Cr. 606 (FB) (E.D.N.Y. 2004) the ILA's Vice-Presidents "follow the lead" of the "Big Six" ILA Executive Officers in all union matters of importance. SAC ¶ 26.

2. LCN Defendants

The LCN Defendants include two members of the Gambino family: Anthony "Sonny" Ciccone, a captain; and Jerome "Jerry" Brancato, a soldier. SAC ¶¶ 29-30. Ciccone is a former Vice-President of the ILA Atlantic Coast District, and Special Administrator of ILA Local 1814. SAC ¶ 118. On March 17, 2003, Defendants Ciccone, and Brancato were convicted of violating and conspiring to violate RICO, 18 U.S.C. § 1962(c) and § 1962(d), in United States v. Gotti, et al., No. 02 Cr. 606 (FB) (E.D.N.Y. 2004). Their convictions were affirmed on appeal. See United States v. Gotti, 459 F.3d 296 (2d Cir. 2006). Further to the longstanding structure, organization, and operation of the Waterfront Enterprise, Ciccone has been a principal leader of Waterfront racketeering in Brooklyn and Staten Island. SAC ¶ 79.

The LCN Defendants also include James Cashin, a former ILA official and associate of the Genovese family. Cashin, who is charged with multiple acts of racketeering in this case, has been an important intermediary between Genovese soldier George Barone and members of the ILA's Executive Council. SAC ¶¶ 31, 92, 102, 115, 122. Cashin was convicted in June 1978 of assault with intent to kill. SAC ¶ 59.e(2).

3. Co-conspirators Not Named As Defendants

This case names a number of co-conspirators. Broadly speaking, they are members and associates of the Genovese and Gambino crime families; some have been officials of the ILA and its funds. Essentially all have convicted of Waterfront racketeering. SAC ¶¶ 41-50.

George Barone is a soldier of a powerful Genovese family crew based in East Harlem and the Bronx ("the Harlem/Bronx crew"), and is a former International Vice-President, Organizer of the ILA Atlantic Coast District Council, Business Agent for ILA Local 1804-1, and President of Miami, Florida Local 1922. In United States v. Barone, et al., 78 Cr. 185 (S.D. Fl.) Barone was convicted of, among other things, RICO and RICO conspiracy.

Albert Cernadas is the former Executive Vice-President of the ILA and former President of ILA Local 1235. He was a member of the MILA Board and a member of the Board of Trustees of one or more of the NYSA-ILA Funds. Cernadas is an associate of the Genovese family.

Cernadas was indicted in the Eastern District of New York for mail and wire fraud conspiracy in violation of 18 U.S.C. § 371 concerning the ILA. United States v. Coffey, et al., No. 04 Cr. 651 (E.D.N.Y.) (ILG). On September 12, 2005, Cernadas pleaded guilty to the indictment. He subsequently entered into a Consent Judgment and Decree resolving the United States' claims against him in this action. Pursuant to the Consent Judgment and Decree, Cernadas has resigned from his position as ILA Executive Vice-President. Additionally, Cernadas has agreed to be enjoined from having any involvement in the ILA, the ILA's pension and welfare benefit funds, and the Waterfront Enterprise.

Lawrence "Larry" Ricci, was a captain in the Genovese family. Ricci failed to appear in Court midway through trial in United States v. Coffey, et al., in which he was a defendant. His body was found in the trunk of a car approximately two weeks after the trial concluded.

In United States v. Bellomo, No. 02 Cr. 140 (S-2) (E.D.N.Y. 2003) (ILG), the following co-conspirators not named as defendants here were charged with, *inter alia*, engaging in a pattern of racketeering activity in violation of RICO. These individuals included Vicente Gigante, Ernest Muscarella, Liborio Bellomo, Charles Tuzzo, Pasquale Falcetti, Michael Ragusa, Thomas Cafaro, and Andrew Gigante.

Andrew Gigante, is an associate of the Genovese family. Andrew Gigante is the son of the now-deceased Vincent "Chin" Gigante, who was the boss of the Genovese family from the 1980s through the date of the filing of this action.

Ernest Muscarella, also known as "Ernie," was acting boss of the Genovese family between approximately the fall of 2000 and the date of the filing of this action. Prior to becoming acting boss, Muscarella was the captain in the Harlem/Bronx crew of the Genovese family.

Michael Ragusa, also known as "Mickey," is a soldier in the Harlem/Bronx crew of the Genovese family.

Charles Tuzzo, also known as "Chuckie," was a captain in the Genovese family.

Liborio Bellomo, also known as "Barney," between approximately 1988 and 1996, was acting boss of the Genovese family. Prior to that time, Bellomo was the captain of the Harlem/Bronx crew of the Genovese family.

Thomas Cafaro is an associate of the Genovese family. Between approximately the 1970s and 1996, Cafaro was in the Harlem/Bronx crew of the Genovese family. After approximately 1996, Cafaro was in the Genovese family crew of Charles Tuzzo.

Pasquale Falcetti, also known as "Patty," is a soldier in the Genovese family in the Harlem/Bronx crew, and a former high-ranking METRO official.

On April 7, 2003, each of the Bellomo Defendants pleaded guilty to one or more crimes. Bellomo, Cafaro, Falcetti, Muscarella and Ragusa pleaded guilty to violating RICO, and Tuzzo and Andrew Gigante pleaded guilty to extortion conspiracy. Among the acts to which the majority of the Bellomo defendants pleaded guilty was the act which constitutes Racketeering Act 4 in this case: fraud on the METRO-ILA funds with respect to the award of an investment advisor contract.

On April 7, 2003, the United States filed a civil complaint against Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti, Andrew Gigante, Ernest Muscarella, Michael Ragusa, and Charles Tuzzo, pursuant to RICO, alleging that they had conspired to conduct, and participated directly and indirectly in the conduct of, the affairs of an enterprise through a pattern of racketeering activity, as set forth in the Superseding Indictment in United States v. Bellomo. See United States

v. Bellomo, No. 03 Civ. 1638 (ILG) (E.D.N.Y. 2003). Subsequently, they entered into a Consent Judgment and Decree barring them from the Waterfront.

C. THE ILA

The ILA is a national labor union that represents longshoremen and other laborers working at ports around the United States. The ILA is governed by an Executive Council, and it is divided into two geographic districts, the Atlantic Coast District and the South Atlantic & Gulf Coast District. Local union chapters exist within the districts. The ILA's principal office is located in New York City.

The ILA is governed by an Executive Council. The ILA Executive Council consists of a President, Secretary-Treasurer, Executive Vice-President, General Vice-President, General Organizer, Assistant General Organizer, and twenty-six Vice-Presidents. Although the ILA's Constitution vests great power and authority in the Executive Council and, in particular, the top six Executive Officers, this power has never been properly exerted against the influence of organized crime over the Union. Indeed, past events have shown the ILA to be an historically corrupt union, whose ranks and leadership have long been either cooperative or actively complicit with organized crime. SAC ¶¶ 51-71.

In the face of this corruption, the ILA's Executive Council has proven itself persistently unwilling or unable to purge the influence of organized crime from its ranks. See, e.g. SAC ¶¶ 64(a), 66, 67-71. Two of the ILA's current Executive Council members, John Bowers, and Harold Daggett, are subject to consent decrees which they entered into in order to resolve allegations of Waterfront racketeering alleged against them in United States v. Local 1804-1, International Longshoremen's Ass'n, et. al., No. 90 Civ. 0963 (S.D.N.Y. 1993) (LBS) (the "ILA Local Civil

RICO"), a case brought against virtually every important ILA official, local, and pension or welfare benefit fund. SAC ¶ 59. Both have violated these decrees repeatedly. In addition, in the past five years alone, two former ILA Executive Council members, Frank Scollo and Albert Cernadas, pleaded guilty to Waterfront racketeering acts in the Gotti and Coffey cases, respectively. This case establishes that three of the current Executive Council members, Bowers, Daggett, and Gleason, have engaged in racketeering.

D. METRO

Metropolitan Maintenance Contractors' Association, Inc. ("METRO") is an association of employers that conduct interstate commerce on the Waterfront and that has historic ties to LCN families. SAC ¶ 32. Members of METRO include companies which have been controlled by, or otherwise had historic ties to, the Genovese or Gambino families, particularly those owned by former METRO President Umberto Guido, Joseph Perez, Sabato Catucci and Andrew Gigante. SAC ¶ 32. Similarly, the METRO Board of Directors and the officers of METRO have included a number of individuals who were members or associates of the Genovese or Gambino families including Umberto Guido, Thomas J. Eagleton, Sabato Catucci, Vito Ruguso, and Pasquale Falcetti. Organized crime figures including Defendant Jerome Brancato and co-conspirators Michael Ragusa and Pasquale Falcetti have held "no show" jobs at METRO and its affiliated funds. SAC ¶ 32.

METRO and the ILA have established several funds for the benefit of ILA members. SAC ¶¶ 33-36. METRO and the METRO-ILA Funds share management and administrative personnel as well as expenses. In fact, in this regard, they operate as a single entity. SAC ¶ 39. Members and associates of the Genovese and Gambino families have been members of the Boards of Trustees of the METRO-ILA Funds including Umberto Guido, Thomas J. Eagleton, Sabato Catucci, Joseph Perez, Vito Raguso, Defendant Harold J. Daggett, and Co-conspirator Pasquale Falcetti. SAC ¶ 37. In fact, Genovese and Gambino family control and infiltration of the METRO Defendants has been longstanding. SAC ¶ 38. Until recently, Genovese family soldier and Co-conspirator Pasquale Falcetti was a Trustee of the METRO-ILA Welfare Fund and Alternate Trustee of the METRO-ILA Individual Account Retirement Fund, and Genovese family soldier and Co-conspirator Michael Ragusa was Executive Director of the METRO-ILA Fringe Benefit Fund. Jerome Brancato, son of Gambino family soldier Defendant Jerome Brancato, is the METRO-ILA Funds Director, with responsibility for each of the METRO-ILA Funds. Joseph Ragusa, brother of Michael Ragusa, is currently the METRO-ILA Funds Administrator, as well as Secretary for both METRO and the METRO-ILA Funds. Joseph Ragusa and Jerome Brancato obtained their jobs with the METRO Defendants by virtue of their familial relationships to members of organized crime. As set forth more fully in the Complaint, key METRO-ILA Funds contracts have been awarded for the benefit of organized crime. SAC ¶ 38.

E. THE MILA DEFENDANTS

The Management-International Longshoremen's Association Managed Heath Care Trust Fund ("MILA") is the ILA's largest welfare fund, and, as is typical of the various pension and welfare benefit funds of the ILA, LCN-associated ILA officers have been trustees of the MILA Board. SAC ¶¶ 27, 77. These LCN-associated ILA officers have included associates of either the Genovese or Gambino families serving as MILA Trustees, including John Bowers, Robert E. Gleason, Harold J. Daggett, Albert Cernadas, Arthur Coffey, Frank "Red" Scollo, and Frank Lonardo. As set forth more fully in the Complaint, key MILA contacts have been awarded for the benefit of organized crime. SAC ¶ 28.

F. THE UNITED STATES CLAIMS FOR RELIEF

The United States' first claim for relief alleges substantive violations of 18 U.S.C. § 1962(c), against John Bowers, Robert E. Gleason, Harold J. Daggett, Arthur Coffey, James Cashin, Anthony Ciccone, and Jerome Brancato.[3] SAC ¶ 82. The United States' second claim for relief charges the same Defendants with conspiracy to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d). SAC ¶¶ 441-62.

G. THE PATTERN OF RACKETEERING ACTIVITY

The Complaint sets forth a pattern of racketeering activity, comprising the following:

THE RIGGED "ELECTION" OF HAROLD J. DAGGETT AND OTHERS TO HIGH-RANKING ILA OFFICES

(Racketeering Act 1)

The first racketeering act concerns the rigging of the year 2000 elections of high-echelon officials within the ILA to ensure continued control over the ILA, and to perpetuate the Waterfront Enterprise. ILA officials, including Gleason, Daggett, and Cernadas, became aware that John Bowers, who had been President or Executive Vice President of the ILA for over thirty years, might be retiring from his office. This fact came to be known to organized crime as well. SAC ¶¶ 84-85. Various key players in the Waterfront Enterprise believed it was essential to control the selection of Bowers' replacement in order to maintain control over the Waterfront Enterprise. SAC ¶ 87. Thus, George Barone, who is both a former ILA official and a Genovese family member, arranged a meeting to make it clear to Bowers that the Genovese family supported Harold Daggett for the presidency. This meeting was arranged through Arthur Coffey and took place in Miami, Florida. SAC ¶ 89-90. During this meeting, Bowers agreed to support Daggett as his ultimate replacement in return for Barone's agreement to take care of Bowers' son, and also to "be responsible" for Daggett. SAC ¶ 90.[4]

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[3] 18 U.S.C. § 1962(c) provides, in its entirety:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

Barone's actions were driven by the fact that the Genovese family wanted Daggett to ascend within the ranks of the ILA and, ultimately, to the ILA Presidency because Daggett was a Genovese family associate and because, as President of ILA Local 1804-1, Daggett had an important relationship with the shipping industry, including container maintenance and repair businesses. In the view of the Genovese family, Daggett was the "golden goose." SAC ¶ 88.

As part of the continuing effort to ensure Daggett's ascension into leadership, Barone, through James Cashin, directed Robert Gleason to support Daggett as well, and Gleason agreed. SAC ¶ 92. When the position of ILA General Organizer opened up in the Spring of 2000, it was decided that Daggett should be placed in that position so that he would be appropriately situated to succeed Bowers. SAC ¶¶ 93-95.

In order to place Daggett on the Executive Council, however, the Genovese family needed an "accommodation" from the Gambino family. On behalf of the Genovese family, Anthony Ciccone agreed to make the accommodation, as discussed in a May 24, 2000 conversation between Ciccone and Gambino family soldier Primo Cassarino. As part of the accommodation, Gambino family associate Louis Pernice would be elevated to a position on the Executive Board of the Atlantic Coast District. The accommodation was also the subject of a meeting between Genovese

[4] Bowers son, John Bowers, Jr., is currently a Vice President of the ILA. SAC ¶ 26.

family captain Alan Longo, and Gambino family soldiers Jerome Brancato and Primo Cassarino. Ciccone also enlisted the assistance of ILA Vice-President Frank Scollo, who was President of Local 1814, to ensure that election scheme was carried out. After Bowers later expressed his preference that Daggett be placed in the Assistant General Organizer position instead in order to ward off internal conflict at the ILA, the Gambino and Genovese families came to an agreement as to the new slate of officers, each of whom was "elected" on July 19, 2000. SAC ¶¶ 102-112.

In accordance with this plan, the Executive Council, including Coffey, and led by Bowers and Gleason, voted unanimously to place Daggett in the position of Assistant General Organizer. In a separate election, Pernice was placed on the Executive Board of the Atlantic Coast District. Immediately after the election, from the location of the vote in Lake Tahoe, Frank Scollo called Ciccone to report the results. Cassarino answered the call, stating that Ciccone, was not there but that Cassarino would deliver the message. Scollo then reported the results:

> It's four of them. . . Richie Hughes, ACD Secretary-Treasurer; Louis Pernice, DC General Vice-President; The International, Jerry Owens, General Organizer; Harold J. Daggett gets the Assistant General Organizer.

SAC ¶ 111. In acting to ensure the election of these officers, these defendants engaged in fraud upon the ILA membership, concealing their relationship with LCN figures and thereby breaching their fiduciary duties to the ILA membership. SAC ¶¶ 84-137.

Racketeering Act 1 charges Defendants Bowers, Brancato, Cashin, Ciccone, Coffey, Daggett and Gleason with wire fraud (18 U.S.C. §§ 1343; 1346 & 2). Racketeering Act 1 also charges Defendants Brancato, Cashin and Ciccone with extortion conspiracy and extortion (18 U.S.C. §§ 1951 & 2).

SCHEME TO RIG THE MILA PBM CONTRACT

(Racketeering Act 2)

MILA provides health insurance to a majority of ILA members, and is governed by a Board of Trustees, which is divided between ILA and Management representatives. SAC ¶¶ 140, 143. During the time relevant to the Complaint, John Bowers served as Co-Chairman of MILA on the union side, along with a Management Co-Chairman. SAC ¶ 41.

Racketeering Act Two concerns the rigging of a MILA pharmacy benefit management ("PBM") contract to GPP/VIP, a company associated with organized crime. Led by Board members Bowers, Daggett and Coffey, the ILA Trustees on the MILA Board ensured that GPP/VIP received part of the contract after a selection process which began in 1997. During the initial selection process, the Management Trustees favored a company called Express Scripts, while the uUnion Trustees favored GPP/VIP. SAC ¶¶ 149-151. Ultimately, the two sides agreed to a compromise splitting the geographic areas between the two companies, even though Express Scripts had agreed to compromise on terms much more favorable than those offered by GPP/VIP. SAC ¶¶ 149-151.

During the selection process, Barone agreed, pursuant to a meeting with Larry Ricci, a Genovese family member, that he would use his influence with Daggett and Coffey to persuade them to support the company that then-ILA Executive Vice President and MILA Trustee Albert Cernadas supported. SAC ¶¶ 152-54. This was done with the understanding that Ricci would use his influence over Cernadas to persuade him to support the company favored by the Genovese family: GPP/VIP. SAC ¶ 152.

In point of fact, GPP/VIP was owned in part by Vincent Nasso, an associate of Anthony Ciccone, who had paid Ciccone $400,000 to secure the selection of his company as PBM. SAC ¶ 157. Ciccone ultimately gave about $75,000 of this money to the Genovese family, as payment for the family's help in the selection of GPP/VIP. SAC ¶ 158.

In anticipation of GPP/VIP's contract expiring on December 31, 2001, MILA issued a new Request for Proposals ("RFP") for a PBM in or about August, 2001. Frank Scollo, a MILA Union Trustee knew that Ciccone was interested in GPP/VIP staying on as PBM, and he kept Ciccone abreast of developments in the PBM selection process through direct communication and through Primo Cassarino. Ciccone also communicated with MILA Executive Director Louis Valentino for the purpose of influencing the award of the PBM contract.

Seven vendors responded to the new RFP, including GPP/VIP and Advance PCS, the largest private PBM in the United States. An analysis done by MILA's consultants established that Advance PCS's offer was superior to that of GPP/VIP, and at an October 25, 2001 meeting, the MILA Board unanimously agreed to offer the new PBM contract to Advance PCS. Although he knew that Ciccone wanted the Board to vote for GPP/VIP, Scollo voted for Advance PCS because the cost differential between Advance PCS and GPP/VIP was simply too great. The prospect of losing the GPP/VIP contract, however, was unacceptable to Ciccone, who instructed Scollo to take action.

Thereafter, during the negotiation of the contract with Advance PCS, the Union Trustees raised concerns about the company. Although Advance PCS eventually addressed all of the concerns raised by the ILA trustees, the Union Trustees withdrew their support for Advance PCS and again supported GPP/VIP, recommending that GPP/VIP remain PBM through 2003. In the meantime, MILA asked GPP/VIP to continue to act as PBM through June, 2002. Ultimately, the Management and ILA Trustees deadlocked, and the matter was submitted for arbitration, resulting in the award of the PBM contract to Advance PCS. SAC ¶¶ 164-74. Further to the rigging of these contracts to GPP/VIP, three telephone calls, including two between co-conspirator Ciccone and Primo Cassarino, took place. SAC ¶¶ 196.

In acting to ensure the selection of GPP/VIP the Defendants Bowers, Daggett and Coffey engaged in fraud upon the beneficiaries of MILA, concealing their relationship with LCN figures and thereby breaching their fiduciary duties to MILA's beneficiaries. SAC ¶¶ 138-202.

Racketeering Act 2 charges Defendants Bowers, Cashin, Ciccone, Coffey and Daggett with wire fraud (18 U.S.C. §§ 1343; 1346 & 2). Racketeering Act 2 also charges Defendants Cashin and Ciccone with extortion conspiracy and extortion (18 U.S.C. §§ 1951 & 2).

SCHEME TO RIG THE MILA MENTAL HEALTH BENEFITS CONTRACT

(Racketeering Act 3)

The third racketeering act concerns the scheme to rig the MILA mental health benefits contract. Genovese family associates were in favor of a company known as ComPsych, because Genovese family associate Cashin was a paid consultant of the company. SAC ¶ 207. ComPsych and Cashin were awarded the MILA mental health contract and its renewal because of Cashin's association with organized crime, despite asking for an increase in fees during the renewal process. SAC ¶ 211-15. For example, at a January 29, 1999 meeting of the MILA Board, Defendant Robert E. Gleason asked the Board's consultants to discuss the proposal that had been submitted by ComPsych, notwithstanding the fact that one of MILA's consultants, ASA, had previously rated ComPsych as non-competitive.

Gleason was aware that Cashin was an associate of the Genovese family and, particularly, of Genovese soldier George Barone. Defendants John Bowers, Harold J. Daggett, and Arthur Coffey, as well as then-ILA Executive Vice-President and MILA Trustee Albert Cernadas, were also aware that Cashin was a Genovese family associate, and thus, all supported the award of the contract to ComPsych. In April 1999, ComPsych re-submitted its bid and the MILA Board deemed the bid competitive. The MILA Board subsequently awarded the contract to ComPsych in August 1999. Minutes of the MILA Board establish that Cashin addressed the Board personally with respect to ComPsych's merits.

When the mental health care benefits program was set to expire in late 2001, ILA Trustees again strongly supported awarding the contract to ComPsych, notwithstanding the fact that ComPsych had asked for a 5 percent increase in its fees. Bowers, Daggett, and Cernadas were particularly vocal in their support for Cashin's company at a November 2001 meeting of the MILA Board and opposed the recommendation of Management Trustees that the new contract be put out for bid. Daggett noted that the Metro-ILA Funds had selected ComPsych. Ultimately, MILA renewed ComPsych's contract. Cashin put the MILA mental health contract "on record" with George Barone, establishing that the contract had been obtained through organized crime influence. Among the mailings made in furtherance of this fraud were letters concerning the award of the contract to Bowers, Gleason, and Cernadas from ComPsych.

In acting to ensure the selection of ComPsych, Defendants Bowers, Gleason, Daggett and Coffey engaged in fraud upon the beneficiaries of MILA, concealing their relationship with LCN figures and thereby breaching their fiduciary duties to MILA's beneficiaries. SAC ¶¶ 203-223.

Racketeering Act 3 charges Defendants Bowers, Cashin, Coffey, Daggett and Gleason with mail fraud (18 U.S.C. §§ 1341; 1346 & 2).

FRAUD ON THE METRO-ILA BENEFIT FUNDS

(Racketeering Acts 4 through 6)

Racketeering Acts four through six of the Complaint concern three distinct frauds committed by Harold Daggett and his co-conspirators, against one or more of the METRO-ILA benefit funds.

The first of these frauds focused on getting a Genovese family associate selected as an investment advisor to the METRO-ILA Funds, who would then pay a kickback from the advisor to Thomas Cafaro and Peter Tarangelo, associates of the Genovese family, as well as Liborio Bellomo, acting boss of the Genovese family. SAC ¶¶ 226-27. Daggett, as part of this scheme, agreed to support Wall Street Capital Management because he believed the company to be supported by the Genovese family, thereby violating his fiduciary duty to the METRO-ILA Funds as a member of its Board of Trustees. SAC ¶¶ 236-37. In furtherance of this scheme, Belomo and Cafaro instructed Tarangelo to send sham letters of introduction for the chosen firm to Ragusa at METRO and Harold Daggett at ILA Local 1804-1, supplied the names and addresses of the persons and entities to whom Tarangelo was instructed to write. Racketeering Act 4 charges Defendant Daggett with mail fraud (18 U.S.C. §§ 1341;1346 & 2).

Racketeering Act five involves Daggett's participation in the scheme to award the METRO-ILA Welfare Fund PBM contract to GPP/VIP because of the company's association with organized crime. SAC ¶ 252. Daggett, of course, had played a similar role in supporting the award of the MILA PBM contract to the same company, during the same timeframe. In furtherance of the fraud, the METRO-ILA Welfare Fund sent a letter on August 7, 1998 to GPP/VIP Inc., advising that it was changing its prescription drug program to GPP/VIP. SAC ¶ 256. In acting to ensure the selection of GPP/VIP, Daggett engaged in fraud upon the beneficiaries of the METRO-ILA Welfare Fund, concealing his relationship with LCN figures and thereby breaching his fiduciary duty to METRO-ILA Welfare Fund's beneficiaries. Racketeering Act 5 charges Defendant Daggett with mail fraud (18 U.S.C. §§ 1341; 1346 & 2).

Racketeering Act six stems from Daggett's scheme to rig the selection of the METRO-ILA mental health care benefits contract in favor of Cashin because of his association with organized crime. SAC ¶ 259. Again, Daggett had played a similar role in supporting the award of the MILA PBM contract to the same company, during the same timeframe. Four letters were sent in furtherance of this act, three addressed to Daggett himself, and one to convicted Waterfront Racketeer and Genovese soldier Pasquale Falcetti, who was a trustee of the METRO-ILA Welfare Fund. SAC ¶ 259. In acting to ensure the selection of ComPsych, Daggett engaged in fraud upon the beneficiaries of the METRO-ILA Welfare Fund, concealing his relationship with LCN figures and thereby breaching his fiduciary duty to METRO-ILA Welfare Fund's beneficiaries. Racketeering Act 6 charges Defendants Cashin and Daggett with mail fraud (18 U.S.C. §§ 1341; 1346 & 2).

FRAUD ON THE LOCAL 1922 AND SOUTHEAST FLORIDA PORTS WELFARE FUNDS

(Racketeering Act 7)

Racketeering Act seven involves acts of fraud committed against two separate funds, the Local 1922 and Southeast Florida Ports Welfare Funds, by Arthur Coffey and James Cashin. Like MILA and the METRO-ILA Welfare Fund, these Funds awarded their mental health benefit contract to ComPsych as a result of organized crime influence. Specifically, as with the other ComPsych contracts, the funds awarded the contract to ComPsych because Cashin was a paid consultant of the company. Coffey concealed his longstanding associations with organized crime, in order to work on behalf of those interests to secure the award of the contract to ComPsych. In furtherance of these frauds, no fewer than one letter and two facsimile transmissions were made or sent, including communications concerning the award of the contracts. In acting to ensure the selection of ComPsych, Coffey engaged in fraud upon the beneficiaries of the Local 1922 and Southeast Florida Ports Welfare Funds, concealing his relationship with LCN figures and thereby breaching his fiduciary duty to the Local 1922 and Southeast Florida Ports Welfare Funds beneficiaries.

Racketeering Act 7 charges Defendants Cashin and Coffey with mail fraud (18 U.S.C. §§ 1341; 1346 & 2) and wire fraud (18 U.S.C. §§ 1343; 1346 & 2).

CONTROL OVER LOCAL 1 AND FRAUD ON THE LOCAL 1814 MEMBERSHIP

(Racketeering Acts 8 through 9)

Both of these acts concern organized crime's ongoing efforts to defraud and extort the ILA membership, particularly the membership of Locals 1 and 1814.

Racketeering Act eight consists of conspiracy to extort, attempt to extort, and wire fraud surrounding organized crime's efforts to control, through fear and intimidation, the union activities of Louis Saccenti, a delegate for Local 1 Checkers' Union. SAC ¶ 282. ILA Local 1 represents "checkers" - individuals who check containers, including containers that come in or go out of the Howland Hook Terminal in Staten Island, New York and the Red Hook Terminal in Brooklyn, New York. In or about 2000 and 2001, Saccenti attempted to make changes in work rules at the Howland Hook and Red Hook Terminals. At Ciccone's direction, Frank Scollo, Gambino associate and President of important ILA Local 1814, attempted to prevent Saccenti from making these changes. Specifically, Scollo informed August Decrezenso, a Local 1 Shop Steward, that Ciccone's orders were that Saccenti was to make no rule changes without first notifying Scollo. Saccenti continued to effect rule changes, announcing at one point that "all bets are off." Ciccone then directed Primo Cassarino and Gambino family soldier Richard Bondi to go to Saccenti's home for the express purpose of intimidating Saccenti.

In or about the Summer of 2000, Saccenti decided to fill a temporarily vacant shop steward's position at the Red Hook Terminal without consulting Ciccone. The position was held by Joseph Pimpinella, brother of former ILA General Organizer and Gambino family associate Anthony Pimpinella. Joseph Pimpinella had decided to go on vacation, and Saccenti filled the position with an individual named Ronnie Doyle. Scollo reported this development to Cassarino so that Ciccone would "take care" of Saccenti. Cassarino advised Ciccone of the development, and Ciccone stated that he wanted to "grab hold" of Saccenti. Ciccone and Scollo were concerned that they would lose some power if Saccenti were allowed to replace Pimpinella. Ciccone believed that Saccenti was in "cahoots" with Local 1 President Stephen Knott, and he directed Cassarino to tell Knott not to do anything with respect to the shop steward position until he heard from Ciccone. Cassarino then instructed Scollo to speak to Knott and to stop Saccenti from putting Doyle in the shop steward position. SAC ¶¶ 283-93. Ciccone and Cassarino conducted two phone calls in furtherance of this scheme. SAC ¶ 310. Racketeering Act 8 charges Defendant Ciccone with extortion conspiracy and attempted extortion (18 U.S.C. §§ 1951 & 2). Racketeering Act 8 also charges Defendant Ciccone with wire fraud (18 U.S.C. §§ 1343; 1346 & 2).

Racketeering Act nine is based upon Ciccone's scheme, conducted with others, to similarly defraud Local 1814 of property and the right to honest services by directing the hiring and firing of Local 1814 representatives. SAC ¶¶ 328-30. In 2000 and 2001, ILA Local 1814 President Frank Scollo enlisted the assistance of Ciccone to resolve a problem that Scollo had with another official of ILA Local 1814, Philip Scala. Scala was an ILA representative and a Local 1814 delegate. Since the ILA special elections in July 2000, Scala had repeatedly failed to report to work. Scollo believed that Scala was angry that he had not received a position on the Executive Board of the Atlantic Coast District Council during the special elections. Scollo wanted to fire Scala, but knew he could not do so without Ciccone's approval. Scollo spoke with Gambino soldier Primo Cassarino who advised Scollo to speak with Ciccone. Scollo spoke with Ciccone who suggested that Ciccone, Scala and Scollo meet. Although the three met, Scala remained unhappy.

Eventually, Scala resigned from his position with the ILA, leaving the Local 1814 delegate position vacant. Primo Cassarino recommended that Scollo fill the position with Patsy Pozzolano, brother-in-law of a Gambino family associate Anthony Pansini. Scollo understood that Pozzolano needed to be approved by Ciccone before Pozzolano could receive the position. In fact, Ciccone demanded to meet with Pozzolano first. Ciccone approved Pozzolano, and Pozzolano became the Local 1814 delegate. Four telephone calls, including three between Cassarino and Ciccone, took place in furtherance of this scheme. SAC ¶¶ 328-331, 333-34. Racketeering Act 9 charges Defendant Ciccone with wire fraud (18 U.S.C. §§ 1343; 1346 & 2).

EXTORTION OF HOWLAND HOOK MARINE TERMINAL AT BRIDGESIDE DRAYAGE

(Racketeering Acts 10 through 11)

The activities of the Waterfront Enterprise have not been limited to the victimization of ILA members and the beneficiaries of ILA funds, but have, unfortunately, extended to Waterfront business, as established by Racketeering Acts ten and eleven.

Racketeering Act ten involves a conspiracy to extort and extortion to obtain property from an owner and operator of Howland Marine Terminal in Staten Island through the use of actual and threatened force by Ciccone, for the purpose of buying labor peace. SAC ¶¶ 337, 343, 349. The Howland Hook Marine Terminal in Staten Island is a major facility for loading and unloading cargo. In or about 1996, the terminal was operated by Howland Hook Container Terminal, Inc. Carmine Ragucci, who had been influential in the opening of the Howland Hook Marine Terminal, was a partner in Howland Hook Container Terminal, Inc. and was its CEO.

In or about 1997, Ragucci began to make payments to Anthony Ciccone to buy labor peace at the terminal. Ciccone instructed Scollo to accept the payments from Ragucci and deliver them to him. In exchange, Scollo was to "go along with Carmine's wishes" at the terminal. Scollo met periodically with Ragucci to collect envelopes containing the payments. After collecting the payments, he delivered them either to Ciccone directly or to Anthony Pimpinella – a former General Organizer of the ILA and Gambino family member. Ragucci continued to make payments, roughly on a quarterly basis, through approximately June or July of 2001, when he left his position at Howland Hook Marine Terminal. Scollo collected the payments for Ciccone and delivered them directly to Ciccone or, beginning in or about 1998, to Primo Cassarino. SAC ¶¶ 337-353.

Racketeering Act 10 charges Defendant Ciccone with extortion conspiracy and extortion (18 U.S.C. §§ 1951 & 2).

Racketeering Act eleven involves the extortion of a trucking company at Howland Hook Marine Terminal. In 1994 and 1995, Carmine Ragucci entered into a contract with Frank Molfetta whereby Molfetta would perform truck broker-dispatcher services at the Howland Hook Marine Terminal once the terminal was operational. As truck broker-dispatcher, Molfetta would act as an intermediary between shipping companies and truckers who would transport cargo containers between ships and rail lines. Under the terms of the contract, Molfetta was to pay Ragucci $150,000 up-front. Afterward, Molfetta would pay an additional $100,000. The contract provided that Ragucci would repay the $150,000 to Molfetta. In exchange for the payments, Molfetta would have, *inter alia*, exclusive rights to perform truck-broker dispatcher services at the terminal. Molfetta paid the $150,000 to Ragucci in 1994.

In 1996, Molfetta started operating Bridgeside Drayage at the terminal under the terms of the contract. Contrary to the terms of the contract, however, Ragucci did not give Molfetta's company exclusive rights at the terminal, and Molfetta refused to pay the additional $100,000 owed under the contract. In or about late 1999, Ragucci informed Molfetta that Anthony Ciccone wanted to meet with Molfetta. Molfetta and Ciccone met at a diner in Staten Island. During their meeting, Molfetta disclosed the terms of the contract with Ragucci. Ciccone then instructed Molfetta not to pay Ragucci. Ciccone told Molfetta that he should not have made a deal with Ragucci. Molfetta understood that he would now be making payments to Ciccone. At a subsequent meeting, Ciccone told Molfetta that Molfetta would need to pay Ciccone $2,000 to $2,500 per month, starting in February 2000. Molfetta said that he could pay only $1,500. Ciccone agreed, but told Molfetta that he would have to make payments effective January 2000. There was no discussion as to when, if ever, the payments would end. Molfetta agreed to make the payments because he feared Ciccone. Thereafter, he met Ciccone on a regular basis to make the payments. The payments were made in cash only so that there would be no record of the transactions. SAC ¶¶ 354-64. Racketeering Act 11 charges Defendant Ciccone with extortion conspiracy and extortion (18 U.S.C. §§ 1951 & 2).

MONEY LAUNDERING AND MONEY LAUNDERING CONSPIRACY

(Racketeering Acts 12 through 26)

Racketeering Acts twelve through twenty-six involve financial transactions conducted from September 18, 2000 through November 29, 2001, by Ciccone and Brancato in order to launder the proceeds of the illegal activity, *inter alia*, the extortion, described above, in violation of 18 U.S.C. § 1956.

EXTORTION OF RIGHT TO EMPLOYMENT OF HIRING AGENT

(Racketeering Act 27)

Racketeering Act twenty-seven involves a conspiracy to extort and an attempted extortion with respect to the forced resignation of an employee at Howland Hook Container Terminal by Ciccone. SAC ¶¶ 394, 397, 403. In or about 1996, Thomas Ragucci became the hiring agent for Howland Hook Container Terminal Inc., the company responsible for operating the Howland Hook Marine Terminal. Ragucci's brother, Carmine Ragucci, was CEO of that company. As hiring agent, Thomas Ragucci was responsible for hiring longshoremen who would load and unload ships at the terminal. In approximately July 2001, O.O.C.L., a shipping conglomerate with a majority ownership interest in Howland Hook Container Terminal, Inc., bought Carmine Ragucci's stake in the company. Carmine Ragucci stopped working at the terminal on or about July 1, 2001. Beginning in and around this time, through approximately October 2001, Frank Scollo had conversations and meetings with Anthony Ciccone and Primo Cassarino about removing Thomas Ragucci from his position as hiring agent.

Ciccone wanted to replace Thomas Ragucci with Robert Anastasia, nephew of Gambino family member and convicted Waterfront racketeer Anthony "Todo" Anastasio, and he directed Scollo to speak with Ragucci. Scollo told Ragucci in approximately August 2001 that Ciccone, Scollo's "boss," wanted Ragucci to leave his position as a hiring agent. Ragucci understood that Ciccone was a member of the Gambino family and was intimidated by Scollo's message. Ragucci was concerned that Ciccone would retaliate if he did not step down as hiring agent. SAC ¶¶ 394, 397, 403.

Racketeering Act 27 charges Defendant Ciccone with extortion conspiracy and attempted extortion (18 U.S.C. §§ 1951 & 2).

EXTORTION OF LONGSHOREMAN

(Racketeering Act 28)

Racketeering Act twenty-eight involves the extortion of a longshoreman by Ciccone. In or about July 2001, ILA Local 1814 President Frank Scollo and Primo Cassarino learned that longshoremen named DeRosa and Mosca had paid an individual named Zinna $3,000 each in exchange for jobs. Cassarino instructed Scollo to tell Zinna that Cassarino wanted to see Zinna about his arrangement with DeRosa and Mosca. Cassarino and Scollo subsequently met with Ciccone and informed him that Zinna had returned $3,000 to DeRosa and Mosca. In response, Ciccone directed Scollo to tell Zinna that Zinna had to pay Ciccone $5,000. SAC ¶¶ 408-10.

Racketeering Act 28 charges Defendant Ciccone with extortion conspiracy (18 U.S.C. § 1951).

EXTORTION OF INJURED LONGSHOREMAN

(Racketeering Act 29)

Racketeering Act twenty-nine involves the extortion of an injured longshoreman by Ciccone. In or about the summer of 1999, Nicola Marinelli, a longshoreman employed on the Waterfront for 33 years, sustained an on-the-job-injury while working at the Red Hook Terminal in Brooklyn. Marinelli received worker's compensation payments from his employer through about May 2000.

In order to secure continued worker's compensation payments, Marinelli contacted a lawyer named George Fortunato. During a meeting with Fortunato, Fortunato explained to Marinelli and his son, Vito Marinelli, that the insurance company funding the payments was not willing to pay any longer. Fortunato then said that Nicola Marinelli would "know" what to do in order to obtain further payments. In or about July 2000, the Marinellis met with Anthony Ciccone and Primo Cassarino to discuss the worker's compensation case. Nicola Marinelli had known Ciccone for many years and referred to him as "El Grande." During the meeting, Ciccone said that he would see what he could do to help in exchange for a sum of money.

On January 18, 2001, Cassarino spoke with an individual named Dennis at the law offices of George Fortunato. Cassarino asked Dennis to look into Nicola Marinelli's worker's compensation claim. Cassarino informed Dennis that Marinelli is a "good friend of ours" and that he "wants to get paid." Cassarino also told Dennis that "the reason he's there is because we sent him there." Shortly thereafter, Cassarino called Nicola Marinelli's son, and told him that he just got off the phone with Dennis, that someone stopped his father's check, and that Dennis was going to look into it. Cassarino then told Marinelli to tell George Fortunato that if it had not been for Cassarino, Fortunato would not have Marinelli as a client. On November 13 and 15, 2001, Cassarino and Ciccone discussed the amount of Marinelli's settlement, $132,000. During discussions which took place in December 2001, Cassarino and Vito Marinelli discussed what amount the Marinellis should pay to Cassarino and Ciccone for Nicola Marinelli's settlement. Marinelli initially paid Cassarino and Ciccone $5,000 as tribute. Unhappy with the payment, Ciccone and Cassarino demanded more. The Marinellis subsequently met Cassarino and paid an additional $5,000. SAC ¶¶ 418-24.

Racketeering Act 29 charges Defendant Ciccone with extortion conspiracy and extortion (18 U.S.C. §§ 1951 & 2).

ARGUMENT

I. THE UNITED STATES HAS SATISFIED THE FLEXIBLE "PLAUSIBILITY" STANDARD REQUIRED TO STATE CLAIM UNDER RULE 12.

Federal Rule of Civil Procedure 12(b)(6) provides a basis upon which a defendant may seek dismissal where a complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion, the court must accept the factual allegations of the non-moving party as true and draw all reasonable inferences in its favor, Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996), Erickson v. Pardus, 550 U.S. ___, 127 S.Ct. 2197, 2199 (2007) (per curiam); only a complaint that does not allege any plausible legal and factual basis for the relief requested is subject to dismissal under the rule. See Bell Atlantic Corp. v. Twombly, 550 U.S. ___, 127 S.Ct. 1955, 1965-69 (2007). Accordingly, "[t]o avoid dismissal, a plaintiff need only satisfy "a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Crews v. County of Nassau, No. CV-06-2610 (JFB), 2007 WL 4591325 at *6 (E.D.N.Y. Dec. 27, 2007) (Bianco, J.) (citing Iqbal v. Hasty, 490 F.3d 157-58 (2d Cir. 2007)).

As the Supreme Court has stated, "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes 416 U.S. 232, 236 (1974). Indeed, as this Court has itself previously noted, "[t]he court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." State Farm Mut. Auto Ins. Co., v. CPT Med. Services, 375 F. Supp. 2d 141, 149 (E.D.N.Y. 2005) (Glasser, J.) (quoting Goldman v. Belden, 754

F.2d 1059, 1067 (2d Cir. 1985).

In the present case, the United States has amply satisfied all applicable pleading requirements, and accordingly, the Complaint should be upheld.

II. THE SECOND AMENDED COMPLAINT ADEQUATELY PLEADS A RICO ENTERPRISE.

In their motions to dismiss the Complaint, Defendants ILA, Robert Gleason, MILA, and MMMCA and METRO-ILA Funds (the "METRO Defendants") each claim that the government fails to allege a common purpose uniting all the defendants sufficiently to properly plead an association-in-fact RICO enterprise. See ILA Mem. at 12-14; Gleason Mem. at 23-24; MILA Mem. at 6-8; METRO Defendants Mem. at 3, 13-14. Defendant Gleason asserts that wrongful purposes of some members of the enterprise are not sufficient to establish a common purpose for the entire alleged enterprise. Gleason Mem. at 24. Additionally, as a footnote to defendant Gleason's assertions that the Complaint fails to allege a common purpose, he also asserts the Complaint lacks structural allegations sufficient to sustain a RICO enterprise. Gleason Mem. at 23 n.19.

Similarly, the institutional defendants claim that there could not in fact be a common purpose attributable to both the racketeering defendant members of the alleged enterprise and to the institutional defendants. See ILA Mem. at 13-14; METRO Defendants Mem. at 3, 13. The ILA primarily bases this argument on the premise that, because the ILA was "not responsible for" or did not "benefit from" the bad acts, it could not, therefore, have shared the wrongful purpose. ILA Mem. at 14. MILA echoes this argument, claiming that the lack of benefits accruing to MILA *per se* rules MILA out of the alleged enterprise. MILA Mem. at 8. Additionally, MILA argues that it did not itself "commit[]" any of the alleged wrongful acts. MILA Mem. at 8. In objecting to the remedy sought by the United States, the METRO Defendants likewise argue that the Complaint alleges no racketeering wrongdoing by the METRO Defendants, and that there are no named racketeering defendants "currently associated" with either MMMCA or the METRO-ILA Funds. METRO Defendants Mem. at 22. MILA further argues that its general corporate purpose of providing healthcare benefits immunizes the company from becoming a part of the Waterfront Enterprise, or indeed, any RICO enterprise at all. MILA Mem. at 8.

Underlying each of these arguments is the premise that the institutional defendants are "victims" and, therefore, "as a matter of law," cannot have shared the common purpose of the enterprise. ILA Mem. at 12. In turn, this leads each to the conclusion that the institutional defendants could not be members of the alleged RICO enterprise. ILA Mem. at 12-13; MILA Mem. at 2, 8-9; METRO Defendants Mem. at 3, 14. This is a premise, however, and an argument, that is fundamentally wrong as a matter of law, as well as being inaccurate in point of fact.

By their motions, the Defendants propose a constrained reading of RICO that defies the mandate that the statute "shall be liberally construed to effectuate its remedial purposes," United States v. Turkette, 452 U.S. 576, 587 (1981) (quoting Section 904(a), of RICO, 84 Stat. 947). As this Court has itself found, to sufficiently allege a RICO enterprise at the pleading stage, it is enough to allege the existence of a group sharing a common purpose. United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1124 (E.D.N.Y. 1992) (Glasser, J.). The proper application of the law demonstrates that the Complaint states claims for relief, and that the Defendants' motions should be denied on all grounds.

The Supreme Court has directed that the term "enterprise," as defined in 18 U.S.C. § 1961(4), is to be interpreted "expansively." See Turkette, 452 U.S. at 586-87. Indeed, the expansive reading that must be accorded this term is underscored by Congress' statement of findings in the Organized Crime Control Act of 1970, which states that organized crime's "money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes." 84 Stat. 922-923. See Turkette 452 U.S. at 589. Further, as the Supreme Court established in Turkette, "the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises." Turkette 452 U.S. at 577.

One of the central purposes of the RICO statute, however, is to protect legitimate businesses and entities that have been taken over so as to become a part of an illegal enterprise. See United States v. International Brhd. of Teamsters, 708 F. Supp. 1388, 1395 (S.D.N.Y. 1989) ("That RICO, however, was enacted precisely for the purpose of facilitating the eradication of organized crime elements in legitimate businesses and labor unions is not open to question."). More importantly for present purposes, RICO was specifically designed to deal with, among other things, the pervasive problem of labor unions being infiltrated by LCN. As one court has put it, "in light of the purpose that RICO address the problem of organized crime in labor unions and in light of the liberal construction clause, the court has no doubt that Congress did not intend that RICO be given limited application in the labor context . . ." Int'l Brhd. of Teamsters, 708 F. Supp. at 1395.

In discussing the "broad definition" of enterprise under § 1961(4), the Second Circuit has stated: "The enterprise can be *any* enterprise, not necessarily one engaged in a pattern of racketeering; indeed, it may be a victim of racketeering. This is consistent with Congress's goal of protecting legitimate businesses from infiltration by organized crime." United States v. Porchelli, 865 F.2d 1352, 1362 (2d Cir. 1989) (emphasis added). There, the court also noted the variety of RICO enterprises that have been found, stating that "[i]n many cases, of course, the enterprise itself is the vehicle for the racketeering activity." Porchelli, 865 F.2d at 1362. Additionally, as one court considering the issue has stated: "there have been several cases in which the RICO association-in-fact enterprise included the plaintiff and the defendant[.] [I]n none of these cases was defendant's alleged hidden motive to victimize plaintiff held to prevent plaintiffs' and defendants' association-in-fact from constituting a proper RICO enterprise." Enzo Biochem, Inc. v. Johnson & Johnson, 1990 WL 136038, *6 (S.D.N.Y. 1990).

The institutional defendants in the instant case are much like states, municipalities, elected offices, or corporations that have previously and repeatedly been accepted as proper components of a RICO enterprise. See, e.g., DeFalco v. Bernas, 244 F.3d 286, 307 (2d Cir. 2001) (finding the town of Delaware's inclusion in a RICO enterprise to be proper); United States v. Angelilli, 660 F.2d 23, 30-35 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982) (New York City Civil Court was properly included in enterprise); United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) (same, with respect to municipal entities, including the City of Providence, Rhode Island); United States v. Warner, 498 F.3d 666, 696 (7th Cir. 2007) (state of Illinois constituted an enterprise); United States v. Blandford, 33 F.3d 685, 703 (6th Cir. 1994) (same with respect to state legislative office).

The acceptance of such ostensibly "innocent," or at least neutral, entities as proper components of a RICO enterprise, both in the Second Circuit and elsewhere, recognizes the indisputable fact that, without such entities, the individuals could not commit the acts of racketeering, as the entities provide the means and opportunity for the illegal conduct they seek to pursue. As an example, in DeFalco, the Second Circuit upheld a jury's finding that the Town of Delaware constituted a RICO enterprise – despite being the "passive instrument or victim of" the racketeering activity. 244 F. 3d at 307. Further, in analyzing the language of § 1962(c), the Second

Circuit noted: "This requirement focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity." Id. (citing Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994)).

It is also relevant to note that the distinctness requirement in § 1962(c) presupposes that an enterprise may be, and often will be, made up of "innocent" or "victim" entities, as well as the perpetrators. The Second Circuit has stated: "the plain language of section 1962(c) clearly envisions separate entities, and the distinctness requirement comports with legislative intent and policy[.] This requirement 'focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.'" Riverwoods, 30 F.3d at 344 (quoting Bennett v. U.S. Trust Co., 770 F.2d 308, 315 (2d Cir. 1985)). Clearly RICO enterprises can include "victims" as well as "culpable" parties, and have been found to include both in countless cases. This principle recognizes that, as in the present case, entities created for a neutral or beneficial purpose may be co-opted into the service of malign goals, through the participation and cooperation of their leadership and control groups. Thus, through the participation of key players at the decisionmaking level, these entities become part of an enterprise through a relationship that is, to borrow a biological analogy, parasitic in nature.

As the Seventh Circuit recently noted in a decision which found the State of Illinois to be a RICO enterprise, the inclusion of the State "does not mean that the state itself has violated any federal law; it may instead be a victim of the overall scheme, as are many RICO enterprises." Warner, 498 F.3d at 696. In that case, Illinois was a valid piece of the RICO enterprise, regardless of the fact that "an ongoing scheme to defraud the State of Illinois" was alleged. Warner 498 F.3d at 696. The Seventh Circuit analogized the case before it to a corporation that has been named as part of an enterprise, stating: "If the CEO of a major corporation, who ascended to that position from other senior executive positions, engaged in comparable activities, we would not only accept but expect a RICO conspiracy indictment with the corporation itself named as the RICO enterprise, even knowing that the overwhelming majority of employees, shareholders, and consumers of the corporation were innocent of wrongdoing." Warner 498 F.3d at 696. That some of the entities comprising the RICO enterprise were innocent or victimized did not exclude their inclusion in the overall enterprise. Indeed, without those entities, the wrongful acts would not have been able to be perpetrated.

Not only can the enterprise consist of nothing but "victims" (as the Supreme Court has long since held in Turkette), but an enterprise can be composed of both wrongdoers and neutral or "victim" entities; in such cases, the "so-called" victim components of the enterprise can share a common purpose with wrongdoers through the actions and decisions of those individuals who control the "victim" components of the enterprise. As the First Circuit explained in Cianci when addressing the question of whether municipal entities said to have taken part in the unlawful purpose attributed to the enterprise in that case: "[a] RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members when the latter exploits the former to carry out that purpose." Cianci, 378 F.3d at 83. The key is that "[t]he common purpose was dictated by individuals who controlled the . . . entities' activities and manipulated them to their desired illicit ends." Id. at 83. Indeed, as the Cianci court found: "a corporate or municipal entity does not have a mind of its own for purposes of RICO." Id. at 84. Accordingly, the First Circuit found that the "[u]nlawful common purpose is imputed to the City by way of the individual defendants' control, influence, and manipulation of the City for their illicit ends. " Id. at 84. As that statement implies, the city was a victim of the defendants' manipulation, a tool for their illegal ends, and yet still an appropriate member of the RICO enterprise.[5]

Thus, the jury's finding of a RICO enterprise in Cianci was "sustainable" because of the control exerted over the municipal entities by the defendants. This was so because the defendants' "illegal schemes could function only with the cooperation, witting or unwitting, of certain City agencies and officials. Insofar as [the defendants] criminal schemes were or would be carried out by themselves and others acting in their municipal roles, the City-if only to that extent-did share in the same common criminal purpose." Cianci, 378 F.3d at 85. Further, it was not relevant that some municipal entities were "used in some transaction but not in others." Id. at 86. The court further noted that the city " 'shared' in the enterprise's purpose . . . to the extent of the defendants' considerable influence and control over the relevant municipal agencies, and to the extent of those officials and departments who were wittingly or unwittingly involved in the various schemes." Id. at 88.

Thus, contrary to Defendants' assertions, there is nothing inconsistent about the inclusion of the institutional Defendants as components of the enterprise. Their presence simply recognizes the fact that, through the machinations of organized crime and the willing complicity and scheming of the individual Defendants, these entities have been victimized and controlled with the goal of obtaining money or property from various aspects of the Waterfront and the Port of Miami, the history of which is attested to, and bourne out by, the content of the United States' present

[5] It bears noting that the question of whether components of an enterprise share a common purpose, which Defendants raise in an effort to suggest that the Complaint is insufficient as a matter of law, is ordinarily a question for the finder of fact, and not something to be decided on a motion to dismiss. Cianci, 378 F.3d at 84.

pleading.[6] As the Second Circuit has held, "the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." Smallwood ex rel. Hills v. Lupoli, 2007 WL 2713841, *6 (E.D.N.Y. Sept. 14, 2007) (Bianco, J.) (quoting United States. v. Coonan, 938 F.2d 1553, 1559 (2d Cir. 1991)). In the present case, the United States has adequately alleged an association in fact that has, in practice, and over long years, provided both the possibility and the means for the Waterfront Enterprise to enrich itself through fraud and extortion, necessitating the relief that is now sought. Accordingly, because the presence of so called "victim" entities is entirely consistent with the structure and operation of the Waterfront Enterprise, as alleged, and with controlling law, the Complaint should be upheld, and this action permitted to proceed.

A. The Second Amended Complaint Adequately Pleads The Structural Continuity of the Enterprise.

As noted above, RICO provides that an "enterprise" within the meaning of the statute "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Pursuant to this definition, the Supreme Court has long held that an association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Turkette, 452 U.S. at 583. The Supreme Court additionally noted that "[t]here is no restriction upon the association embraced by the definition" of enterprise in RICO. Id. at 580.[7]

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[6] Indeed, particularly, though not exclusively, with respect to the ILA, the union itself, through the involvement of its high-ranking and controlling officers, has been implicated, and deeply involved with all of the acts alleged in the Complaint, with a high ranking present or former official playing a role at or near the heart of each act.

In accordance with Turkette, the Second Circuit has ruled that an "association-in-fact" enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Coonan, 938 F.2d. 1553, 1559 (2d Cir. 1991)(citing United States v. Bagaric, 706 F.2d 42, 55 (2d Cir.1983)); Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 246-47 (E.D.N.Y. 1993) (Glasser, J.) (stating that the Second Circuit "has held that an association-in-fact enterprise may be based on a common, illicit purpose as evidenced by the alleged racketeering acts without proof of a formalistic, organizational structure.") (citing Coonan, 938 F.2d at 1559-60).[8] In the present case, the United States' Complaint

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[7] The Court further explained that although the "enterprise" and "pattern of racketeering" elements of RICO are separate elements, "the proof used to establish these separate elements may in particular cases coalesce." Id. Notably, although the attributes of enterprise set forth in Turkette must ultimately be *proved*, these evidentiary details need not be pleaded in a complaint. See Seville Industrial Machinery Corp. v. Southmost Machinery, 742 F.2d 786, 789-90 (3rd Cir. 1984) (distinguishing between what a plaintiff must prove under Turkette and what it must plead in a complaint).

[8] Although it must ultimately be established that an enterprise which constituted an association-in-fact functioned as a "continuing unit," this requirement is to be distinguished from the concept of continuity as it pertains to the question of pattern of racketeering activity. As noted by the Second Circuit in United States v. Indelicato:

> Further, we no longer adhere to the view of Ianniello and its progeny that relationship and continuity are necessary characteristics of a RICO enterprise. Neither the statutory definition of enterprise nor the legislative history suggests that those concepts pertain to the notion of enterprise. Rather, the language and the history suggest that Congress sought to define that term as broadly as possible, "includ[ing]" within it every kind of legal entity and any "group of individuals associated in fact although not a legal entity." 18 U.S.C.§ 1961(4).

865 F.2d 1370, 1382 (1989). Although we note that continuity is not required, it is most ironic that Defendants maintain that the Waterfront Enterprise lacks continuity, given the fact that its existence was established, following discovery, and after trial, when a court ruled that the New York/New Jersey Waterfront constituted an "enterprise" within the meaning of the RICO statute and that the defendants who had not settled had conducted or participated in the conduct of the affairs of the Waterfront through a pattern of racketeering activity. See United States v. Local 1804-1, International Longshoremen's Association, 812 F. Supp. 1303, 1344 (S.D.N.Y. 1993) (LBS). The United States respectfully submits that this Court may take judicial notice of the fact that an enterprise of almost coequal scope, extent, and purpose, was found to exist (and deemed legally viable) in U.S. v. Local 1804-1. See Schwartz v. Capital Liquidators, Inc., 984 F. 2d 53, 54 (2d Cir. 1993) (taking judicial notice of docket entries in another court);

alleges in considerable detail the organization, structure, operation, and management of the enterprise, the leaders of the Enterprise, and the roles of the Defendants therein. This more than meets the requirement, articulated by the Supreme Court, that a complaint simply identify a formal or informal structure. Turkette, 452 U.S. at 583.

B. The United States Is Not Judicially Estopped from Alleging the Existence of the Waterfront Enterprise

Defendants ILA and John Bowers argue that judicial estoppel bars the United States' claims for relief because of purported inconsistencies between the allegations in this case and allegations in prior criminal cases. See ILA Mem. at 18-19, Bowers Mem. at 33-35. The defendants deliberately misconstrue the Complaint and promote a version of the facts that is utterly at odds with the facts pleaded by the United States.

1. Judicial Estoppel Is A Doctrine Of Limited Application

Judicial estoppel is an equitable doctrine with limited application that bars a party that has successfully asserted a particular position in one proceeding from adopting a contrary position in a later proceeding. Its purpose is to protect the integrity of the judicial process. New Hampshire v. Maine, 532 U.S. 742, 749 (2001). While there are no "inflexible prerequisites or an exhaustive formula" for applying the doctrine, the Supreme Court has identified three factors that should be considered when judicial estoppel is invoked: (1) is the party's later position clearly inconsistent with its earlier position; (2) was the party successful in persuading a court to accept its

Anderson v. Rochester-Genesee Regional Transp. Corp., 337 F. 3d 201, 205, n.4 (2d Cir. 2003) (noting categories of materials of which notice may properly be taken, including records in prior litigation). See also United States v. Kragness, 830 F.2d 842, 856-57 (8th Cir. 1987) (enterprise found to continue in existence despite changes in structure and personnel over time).

earlier position; and (3) would the party seeking to assert an inconsistent position derive an unfair advantage or impose unfair detriment upon the opposing party if not estopped? Id. at 750-51. In different factual contexts, "additional considerations may inform the doctrine's application." Id. at 751. Judicial estoppel will not apply unless there is a "true inconsistency between the statements in the two proceedings." Wight v. BankAmerica Corp., 219 F.3d 79, 90 (2d Cir. 2000) (citation and internal quotation marks omitted). "If the statements can be reconciled, there is no occasion to apply estoppel." Id. Similarly, in criminal cases, "there is a clear consensus that . . . prosecutors should be barred from arguing a different theory of liability in a second prosecution only where the government's trial theories are 'inherently factually contradictory' and thus are 'irreconcilable.' In other words, judicial estoppel may be applied to prevent a due process violation, if ever, only where there is a clear and categorical repugnance between the government's two theories of the case." United States v. Urso, 369 F. Supp. 2d 254, 264 (E.D.N.Y. 2005) (Garaufis, J.) (citations omitted).

2. Judicial Estoppel Does Not Bar Pleading Of The Waterfront Enterprise

The Complaint alleges that the Waterfront Enterprise includes, among others, members and associates of the Genovese and Gambino families. SAC ¶ 72. It further alleges that the leaders of the Waterfront Enterprise, who include members and associates of the two crime families, "directed one or more of the other members of the Enterprise," including Defendant ILA, Defendant MILA and the METRO Defendants, "in carrying out unlawful and other activities in furtherance of the conduct of the Enterprise's affairs, and/or participated in the operation and management of the Enterprise." Id. at ¶ 80. There is simply no inconsistency between these allegations and the pleadings in Bellomo and Gotti, which respectively asserted that the Genovese and Gambino families exerted influence over Waterfront persons and entities. The Complaint looks beyond any one crime family and emphasizes the importance of the broader Waterfront Enterprise. Indeed, the members and associates of the Genovese and Gambino crime families who were the key defendants and co-conspirators in Bellomo and Gotti are simply a subset of the Waterfront Enterprise, with respect to, and to the extent to which, those individuals were involved in aspects of Waterfront affairs. This does not create a "clear and categorical repugnance" with the related criminal cases, and, as such, judicial estoppel, does not apply. See Maharaj v. Bankamerica Corp., 128 F.3d 94, 98-99 (2d Cir. 1997); Urso, 369 F. Supp. 2d at 264.

In arguing that the Complaint is inconsistent with prior prosecutions and thus untenable, the Defendants ignore well-established law that a pattern of racketeering activity may include a crime committed in furtherance of two different enterprises, see Urso, 369 F. Supp. 2d at 264-65, and that a racketeering enterprise may comprise members who were also members of a different, previously-charged, enterprise, see United States v. Connolly, 341 F.3d 16, 28 (1st Cir. 2003). Thus, this case is not inconsistent, let alone clearly irreconcilable, with Bellomo and Gotti. Rather, this case completes the narrative begun in those cases.

In Urso, RICO defendant Anthony Basile argued that one of the racketeering acts, which alleged a marijuana trafficking conspiracy from January 1990 to May 1993, should be dismissed because "he was tried for racketeering conspiracy in conjunction with [the Puglisi] enterprise . . . in a 1995 prosecution . . . in which the government charged that Basile had been involved in a conspiracy to distribute marijuana from January 1990 to September 9, 1992." Urso, 369 F. Supp. 2d at 263. He argued that because "the government asserted in the 1995 trial that his marijuana trafficking activities were related to the Puglisi enterprise, the government should now be estopped from arguing that these same acts were related to the activities of the Bonanno crime family." Id. The court observed that Second Circuit precedent permits the government to "allege in successive prosecutions that an entire pattern of racketeering activity is connected to two separate RICO enterprises," United States v. Russotti, 717 F.2d 27, 33 (2d Cir.1983), and rejected Basile's estoppel argument. Specifically, the court held that "both logic and well-established law suggest the permissibility of the government's implicit accusation that Basile's alleged marijuana dealings during the period charged in the instant indictment were related to *both* the Puglisi and Bonanno enterprises." Id. (emphasis added).

Like Urso, this is not a situation "in which the evidence indicates that either A or B, but not both, could have committed a crime, and the government nevertheless prosecutes both A and B for the crime under incompatible theories." Urso, 369 F. Supp. 2d at 264. Simply put, "it is possible, that both allegations . . . are true," namely that certain individuals committed predicate acts in furtherance of an organized crime family enterprise *and* the Waterfront Enterprise. Id. See also Connolly, 341 F.3d at 28 (finding that membership in one enterprise does not, ipso facto, preclude membership in another criminal enterprise). The fact that the United States previously described certain defendants and co-conspirators as members and associates of the Gambino or Genovese family enterprises and now as members of the Waterfront Enterprise does not alter the analysis because there is no reason that one person cannot be a member of two enterprises.

Similar questions were presented in United States v. Boyle, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) (summary order).[9] There, the Second Circuit considered the defendant's argument that the government's theory of prosecution was factually inconsistent with one pursued in a previous litigation. Specifically, Boyle argued that a 1994 robbery could not constitute a predicate act in furtherance of the enterprise alleged in his prosecution when, years before, the government had characterized that same robbery as a predicate act in furtherance of a different enterprise. The Court rejected Boyle's argument, holding, "Nothing dictates that a single crime cannot be committed by two enterprises working together, each in furtherance of its own interests." Id. at *1. "Because a single racketeering act may be in furtherance of the activities of two different enterprises, the government has not contradicted itself." Id. Thus, the Defendants' argument that supposed inconsistencies between the pleading of enterprise in this case and in Bellomo and Gotti warrants judicial estoppel has no merit and must be rejected.

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[9] Although this summary order has no precedential effect, it is directly on point and, as such, the United States respectfully brings it to the Court's attention. A copy of the opinion may be obtained at www.ca2.uscourts.gov.

III. THE SECOND AMENDED COMPLAINT COMPORTS WITH FEDERAL RULE OF CIVIL PROCEDURE 8

In its motion to dismiss, Defendant ILA argues that the United States' Complaint violates Federal Rule of Civil Procedure 8 because it is longer than the First Amended Complaint, which this Court found to violate Rule 8(a), and therefore "*a fortiori*," the Complaint violates the rule as well. ILA Mem. at 8. In sum, the ILA alleges that the Complaint violates Rule 8 because it fails to provide notice to the defendants without "imposing an unnecessary burden" on them, the exhibits contain contradictory assertions, and, lastly, that the "form and manner" of the Complaint imposes an "unduly heavy burden" on the defendants. ILA Mem. at 9-10. In addition, the ILA seeks to strike those portions of the Complaint which it deems merely "historical" in nature. ILA Mem. at 11.

The METRO Defendants likewise argue that the Complaint violates Rule 8(a) and poses an undue burden on defendants because of the length of the Complaint and the incorporations by reference. METRO Defendants Mem. at 6-10. Additionally, the METRO Defendants later make the argument that the Complaint is "impermissibly vague" and "general" and therefore fails to provide clear notice and is contradictory. METRO Defendants Mem. at 11. Robert Gleason also makes similar arguments as to the Complaint's compliance with Rule 8(a), Gleason Mem. at 27-28, and further alleges that the Complaint fails to adequately plead mail and wire fraud under Rule 9(b). Gleason Mem. at 28-33.

As a first matter, the ILA's assertion that there are contradictory assertions in the Complaint is an argument that has no place in a Rule 12(b)(6) motion, and, even assuming it to have any merit, is an issue to be decided by the trier of fact. With respect to the Defendants' remaining arguments, as one court has noted, "[p]rolixity is a bane of the legal profession but a poor ground for rejecting potentially meritorious claims. Fat in a complaint can be ignored, confusion or ambiguity dealt with by means other than dismissal." Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).[10] In this case, what Defendants seek to strike from the Complaint is not even fat, but rather the very bone and sinew of the Waterfront Enterprise as it exists, and has existed, over decades. Paradoxically, Defendants ask this Court to cull this background, and with the same breath, argue that the allegations of the Complaint lack continuity and reflect only isolated incidents of criminality. This is not sufficient.

In the present case, the recitation of past Waterfront prosecutions and preceding events involving the Waterfront Enterprise is not historical surplusage, as the Defendants (including the institutional Defendants) suggest, but rather is relevant, and integral to, the causes of action set forth in the Complaint. The Waterfront Enterprise, as currently alleged, is an extension and continuation of the enduring alliance between key ILA leaders and organized crime, as reflected in the past prosecutions, convictions, and lawsuits addressed in the Complaint. As the Second Circuit has held, in considering the admissibility of so-called "historical" information in organized crime cases, the use of such information is both appropriate and may serve many legitimate purposes. See United States v. Reifler, 446 F.3d 65, 91-91 (2d Cir. 2006). For example, "[e]vidence that activities such as bribery were conducted on behalf of organized crime is relevant to establish the requisite relatedness and continuity." Id. at 91 (internal citations omitted). Similarly, "[e]vidence of a defendant's ties to organized crime or of his other crimes may also be admissible to provide background for the events alleged," id. (internal quotation marks and citations omitted), or to "furnish an explanation of the understanding or intent with which certain acts were performed." Id. at 92 (internal quotation marks and citations omitted). Finally, "[e]ven as to a defendant who had no ties to organized crime, evidence that one of the other participants had such ties may be admitted if relevant to rebut the defendant's claim that he did not know the activity in which he participated was unlawful." Id. (internal quotation marks and citations omitted).

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[10] Even if Defendants' arguments on this issue had any merit (which they do not), as this Court has stated, "[W]here the deficiency of the pleading is that it contains too much detail, the court should generally strike redundant or immaterial matter rather than dismiss the complaint." Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 246 (E.D.N.Y. 1993) (Glasser, J.) (citing Salahuddin v. Cuomo, 861 F.2d 40, 43 (2d Cir.1988).

Here, the United States has pled facts regarding the history, impact, and course of the ILA's long entanglement with LCN . Indeed, to properly portray and provide the context for the depth, breadth, and evolving nature of the interrelationship of the various components of the Waterfront Enterprise, it is necessary to depict the manner in which that relationship has previously existed. It is because of the complexity of the relationships that underlie the Waterfront Enterprise, and the long years over which these relationships have developed, that so lengthy a recitation of prior events is required. Without this recitation, neither the scope of the wrongdoing alleged in the Complaint, nor the scope of the relief requested, may be properly understood.

It bears emphasis that Defendants' arguments with respect to the burden of responding to the Complaint, and their arguments that the United States' decision to incorporate prior indictments and pleadings by reference breeds inconsistencies are both wholly vacuous. Volume alone, without more, cannot properly provide the basis for concluding that a party's burden in responding is too great, especially where, as here, the relevance of prior events is so great, and, in many cases, the present defendants were involved in, or connected to, the preceding events and legal proceedings that are now alleged in the Complaint. 916 Radio v. F.C.C., No. 05-719 (FCD)(DAD), 2005 WL 2114187 at *2 (E.D. Cal. Aug. 31 2005) (denying motion to dismiss under Rule 8, noting that length alone is an insufficient ground for dismissal) (collecting cases). Secondly, the United States has incorporated prior pleadings and indictments by reference not to engraft the legal theories of those cases into the present pleading, but to demonstrate the existence of those prosecutions, and the factual underpinnings of those allegations, and in so doing, to provide the factual basis that underlies the present pleading and its legal and factual content.[11] As such, the volume of the Complaint is dictated, more than anything else, not by choices in pleading style, but

[11] The United States notes in this regard that Defendants cannot satisfy the stringent standard to strike these allegations under Rule 12(f). The Second Circuit has spoken unequivocally of its view that motions to strike factual allegations from a party's pleading are disfavored, and has deemed "it ... settled that [such a] motion will be denied, unless it can be shown that no evidence in support of the allegation would be admissible." Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976). See also Reiter's Beer Dist. Inc. v. Schmidt Brewing Co., 657 F. Supp. 136, 143 (E.D.N.Y. 1987) (McLaughlin, J.) ("motions to strike are generally disfavored and will not be granted unless the matter asserted clearly has no bearing on the issue in dispute."). As the Circuit has framed the issue, "the Federal Rules of Civil Procedure have long departed from the era when lawyers were bedeviled by intricate pleading rules and when lawsuits were won or lost on the pleadings alone. Thus, the courts should not tamper with the pleadings unless there is a strong reason for so doing." Lipsky 551 F.2d at 893 (quoting Nagler v. Admiral Corp., 248 F.2d 319, 325 (2d Cir. 1957). Accordingly, "to prevail on a motion to strike, a party must demonstrate that (1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant." Hart v. Dresdner Kleinwort Wasserstein Sec., LLC, No. 06 Civ. 134 (DAB), 2006 WL 2356157 (S.D.N.Y. 2006) (internal quotation omitted) (denying motion to strike allegations concerning company's culture of sexual harassment and hostile work environment, despite the fact that plaintiff's complaint concerned only claims of unequal pay).

by the magnitude of wrongdoing that has so long plagued the Waterfront, and which both informs and underlies the present allegations. As such, while voluminous, the content of the Complaint remains vitally necessary, and appropriately tailored, to the nature of the claims and the scope of relief sought.

IV. THE SECOND AMENDED COMPLAINT STATES CLAIMS FOR CONSPIRACY TO VIOLATE RICO.

The Complaint alleges that John Bowers, Harold Daggett, Robert Gleason, Arthur Coffey, James Cashin, Jerome Brancato and Anthony Ciccone conspired to violate 18 U.S.C. § 1962(c). SAC ¶¶ 440-64. Brancato and Ciccone have been found guilty of conspiring to violate RICO, violating RICO, and engaging in predicates which are part of the pattern of racketeering alleged in this action, see SAC Exs. 6 and 7, including acts that Bowers, Daggett, Gleason, and Cashin are charged with committing. Brancato and Ciccone's convictions have been upheld on appeal. See United States v. Gotti, 459 F.3d 296 (2d Cir. 2006).[12]

The RICO conspiracy provision states that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of [18 U.S.C. § 1962]." To establish a RICO conspiracy violation, a plaintiff must ultimately prove each of the following elements:

1. The defendant knowingly agreed to conduct or participate, directly or indirectly, in the conduct of the affairs of the charged enterprise through a pattern of racketeering activity.
2. An enterprise would be established as alleged in the indictment.
3. The enterprise would be engaged in, or its activities would affect, interstate or foreign commerce.
4. The defendant would be employed by, or associated with, the enterprise.

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[12] Gotti, Ciccone, and Brancato are estopped from denying the essential allegations of these offenses. See 18 U.S.C. § 1964(d).

See Salinas v. United States, 522 U.S. 52, 62-65 (1997).

The RICO conspiracy provision does not require the commission of an "overt act or specific act" and is thus "more comprehensive" than a general conspiracy offense. Salinas, 522 U.S. at 63. See also, United States v. Friedman, 854 F.2d 535, 562 (2d Cir. 1988) ("A RICO conspiracy is . . . broader than an ordinary conspiracy to commit a discrete crime. . . ."). "[I]t is clear that RICO has more broadly defined the allowable purpose or objective of a conspiratorial agreement under § 1962(d)." United States v. Local 560, 581 F. Supp. 279, 330 (D.N.J. 1984). "Conspiracy may be established even where the underlying offenses are apparently unrelated . . . ." Id. Moreover, it is well-established that a conspiracy to violate RICO and violation of RICO's substantive provisions, i.e., 18 U.S.C. §§ 1962(a)-(c), are not the same offense. United States v. Sessa, 125 F.3d 68, 71 (2d Cir. 1997) (citing cases). A conspiracy to violate RICO may exist in the absence of a substantive violation. Salinas, 522 U.S. at 65. Indeed, a person may be found to have conspired to violate RICO even if it has been expressly determined that he has not committed a substantive RICO violation. See United States v. Zichettello, 208 F.3d 72, 98-100 (2d Cir. 2000).[13]

Thus, the United States need not prove at trial, much less establish in response to Defendants' motions to dismiss, that any of the racketeering Defendants committed any of the predicate acts identified in Complaint. Instead, the United States must simply show that the

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[13] Any notion that a RICO conspiracy claim is dependent upon an actual substantive RICO violation, or that a RICO conspiracy claim necessarily fails where a related substantive violation has been dismissed, must be rejected. See Bowers Mem. at 21. Cases that may be interpreted to suggest that a conspiracy claim must be dismissed where a related claim for a substantive violation has been dismissed have been either misinterpreted or, to the extent properly interpreted, do not reflect the current state of the law. See Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 353 (S.D.N.Y. 1998) (collecting cases). In Zichettello, for example, a substantive RICO count had been dismissed as to three defendants who were nonetheless convicted of conspiring to violate RICO. 208 F.3d at 80, 98-100.

Defendants conspired to violate 18 U.S.C. § 1962(c). As this Court has ruled, a plaintiff in a civil RICO conspiracy action:

> is not required to plead a cognizable, substantive RICO claim against defendants in order to allege a claim for RICO conspiracy. Rather, with respect to predicate acts, plaintiff must allege only that defendants agreed to commit at least two predicate RICO acts, not that defendants themselves committed the two predicate acts, or even that these acts were carried out. Strongest support for this conclusion is found in Salinas, . . . the seminal case interpreting the RICO conspiracy provision. There, the Supreme Court found that §1962(d) "broadened [traditional] conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts." Salinas . . . Moreover, consistent with long-standing principles enshrined in both criminal and civil jurisprudence relating to "conspiracy," a "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Id.

State Farm Mutual, 375 F. Supp. 2d at 150-51.

Importantly, although the Complaint has been pleaded with great specificity, the elements of a RICO conspiracy claim need only meet the notice pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. See United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. 1114, 1123-24 (E.D.N.Y. 1992) (Glasser, J.); see also, Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 26 n.4 (2d Cir. 1990) (Glasser, J.); State Farm Mutual, 375 F. Supp. 2d at 153; United States v. District Council, 778 F. Supp. 738, 746-47 (S.D.N.Y. 1991). "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both the claim and defense and to define more narrowly the disputed facts and issues." Private Sanitation Indus. Ass'n, 793 F. Supp. at 1124 (quoting Conley v. Gibson, 355 U.S. 41, 47-48 (1957)).

A. The Complaint Pleads Conspiratorial Agreement.

The Supreme Court has explained the essence of a RICO conspiratorial agreement as follows:

> A conspirator must intend to further an endeavor of which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.
>
> It makes no difference that the substantive offense under subsection (c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

Salinas, 522 U.S. at 65 (citations omitted).

The class of individuals who may be found to have conspired to violate RICO is broad and encompasses persons who are not involved in the operation or management of the RICO enterprise. Zichettello, 208 F.3d at 99 (ruling that a case for conspiracy to violate 18 U.S.C. § 1962(c) may be brought against defendants who do not meet the operation and management test established in Reves v. Ernst & Young, 507 U.S. 170 (1993)). A person may be held liable for conspiring to violate RICO "even if he is not among the class of persons who could commit the crime directly." United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994). Similarly, a person "may be liable for conspiracy even though he was incapable of committing the substantive offense." Salinas, 522 U.S. at 64. Thus, a person may found liable for conspiring to violate RICO by serving a "support" or facilitating role in the conspiracy. Id. at 63-65; see also State Farm Mutual, 375 F. Supp. 2d at 150 ("defendants may be liable for aiding and abetting, i.e., supporting the alleged conspiracy," citing United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989)); United States v. Sasso, 230 F. Supp. 2d 275, 284 (E.D.N.Y. 2001) (persons not identified in complaint as defendants who facilitated criminal enterprise liable for RICO conspiracy).

Relatedly, "there is no rule requiring the government to prove that a conspirator knew of all criminal acts of insiders in furtherance of the conspiracy." Zichettello, 208 F.3d at 100. Far from needing to plead facts from which one could conclude that a RICO conspirator was omniscient, the United States may support a RICO conspiracy conviction *after trial in a criminal case* merely by showing that the defendant "possessed knowledge of only the general contours of the conspiracy." Id. (citing United States v. Rastelli, 870 F.2d at 828). In other words, the United States must only plead facts which indicate that a defendant "was aware of the general nature of the conspiracy and that the conspiracy extended beyond the defendant's individual role." Zichettello, 208 F.3d at 100. Similarly, "in proving the existence of a single RICO conspiracy, the government does not need to prove that each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all the details of the conspiracy, or contemplated participating in the same related crime." United States v. Castro, 89 F. 3d 1443, 1451 (11th Cir. 1996). Indeed, "'[t]hat each conspirator may have contemplated participating in unrelated crimes is irrelevant.'" United States v. Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995) (quoting United States v. Pepe, 747 F.2d 632, 659-60 (11th Cir. 1984)). For this reason, the Defendants' suggestion that, based upon their interpretation of the facts, the racketeering Defendants cannot be liable for RICO conspiracy because they did not know of every scheme in the conspiracy, is wholly without merit.

It is also well established that a conspirator "who joins an already formed conspiracy knowing of its unlawful purpose may be held responsible for acts done in furtherance of the conspiracy both prior to and subsequent to his joinder." United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975). Accord United States v. Stewart, 104 F.3d 1377, 1382 (D.C. Cir. 1997). Thus, there can be no argument that the Complaint fails to state a claim for RICO conspiracy on the ground that the 1995 onset date predates a particular conspirator's involvement.

Though the United States need not offer proof of the allegations in the Complaint, basic principles concerning the nature and extent of evidence that the United States would have to offer at trial emphasize the sufficiency of the Complaint.

The United States need not prove the existence of a formal agreement among the racketeering Defendants. "'[T]he very existence of the conspiracy must commonly be inferred after the fact from a series of acts, since there is usually no formal agreement or at least none susceptible of proof.'" Mitland Raleigh-Durham v. Myers, 807 F. Supp. 1025, 1053 (S.D.N.Y. 1992) (quoting 4 Weinstein's Evidence P 801(d)(2)(E)(01) at 801-335 (1991)). As stated by the Supreme Court, "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstances.'" Glasser v. United States, 315 U.S. 60, 80 (1942) (quoting United States v. Manton, 107 F.2d 834, 839 (2d Cir.1939)). Proof of RICO conspiracy is no exception.

A "RICO conspiracy, like all conspiracies, does not require direct evidence of agreement; and agreement can be inferred from the circumstances." United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir. 1986) (citing Glasser, 315 U.S. at 80); see also United States v. Castro, 89 F.3d at 1451 (ruling that, in the absence of direct evidence, an agreement may be shown by circumstantial evidence that "others were also conspiring to participate in the same enterprise."); United States v. Sutherland, 656 F.2d 1181, 1194 (5th Cir. 1981) (holding that "an agreement to violate RICO may, as in the case of a traditional 'chain' or 'wheel' conspiracy, be established on circumstantial evidence . . ."). Thus, "facts implying" the existence of an agreement will suffice. See Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 25 (2d Cir. 1990). Moreover, though a defendant's commission of predicate acts does not necessarily establish that the defendant conspired to commit those acts, see United States v. Private Sanitation Indus. Ass'n, 793 F. Supp. at 1146, the fact that the acts have been committed may be considered in determining whether there was a conspiratorial agreement, see United States v. Crocket, 979 F.2d 1204, 1218 (7th Cir. 1992); Sutherland, 656 F.2d at 1189. Additionally, proof of an enterprise defined as an association-in-fact may also constitute proof of an unlawful conspiratorial agreement. United States v. Bennett, 44 F.3d 1364, 1372 (8th Cir. 1995).

The Complaint is replete with facts that imply the evidence of conspiratorial agreement, including the proven existence of the Waterfront Enterprise in which the racketeering Defendants have played key roles for many years.

1. The Complaint Pleads a Single Conspiracy to Violate RICO and Sets Forth Sufficient Facts Concerning the Participants, Objective, Time-frame, and Acts Taken in Furtherance of the Conspiratorial Agreement

The Complaint and record in this case thus far provide more than sufficient facts to plead the existence of a conspiratorial agreement. The Complaint specifies that the racketeering Defendants conspired since 1995 through the commencement of this action "to conduct and participate, directly and indirectly, in the conduct of the affairs of the Waterfront Enterprise through a pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). SAC ¶ 441. The Complaint also sets forth the methods and means of the conspiracy. SAC ¶¶ 441-62. Additionally, though the Complaint need not set forth with particularity the racketeering acts effectuated pursuant to the Defendants' conspiracy to violate 18 U.S.C. § 1962(c), the Complaint nonetheless does so. The Complaint also provides the factual context of mob domination of the Waterfront, including the Defendants' involvement in this domination, their relationships with one another and their connection with the Enterprise, all of which strongly support the conspiracy allegations. SAC ¶¶ 15-71. Therefore, the Defendants' argument that the conspiracy claim is a "conclusory add-on," ILA Mem. at 20-22, must be rejected.

Disregarding the totality of the facts, the Defendants describe the allegations of conspiracy as "bare bones." Tellingly, in making their arguments, the Defendants rely in great part upon cases in which the sufficiency of the government's proof of conspiracy has been challenged after trial on the merits. See, e.g., Bowers Mem. at 22-27. These cases, therefore, have limited, if any, application at this point.[14] Nonetheless, they illustrate why the allegations in the Complaint state claims for relief for RICO conspiracy.

Quoting the decision of the Second Circuit in United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), Defendants note that, "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it . . . ." Bowers Mem. at 24. The Complaint in this case does not suggest otherwise: the fair import of the racketeering Defendants' concerted purpose was to violate RICO, as their operation of the Waterfront Enterprise makes clear.

[14] The Defendants acknowledge that the Peoni line of cases concern review of criminal proceedings upon post-trial motion. Bowers Mem. at 24 n.13. Bowers nonetheless argues that these cases are "precisely applicable" to his motion to dismiss because the Complaint "defines [his] limited role and knowledge, in contrast to the far-ranging conspiracies alleged therein." Id. This statement simply cannot be reconciled with the allegations in the Complaint which place Bowers at the core of the RICO conspiracy.

Another decision of the Second Circuit, not cited by the Defendants, is equally instructive. In United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944), a decision by the author of Peoni, Learned Hand, the Second Circuit observed that "a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership . . . ." 142 F.2d at 506. In this instance, the racketeering Defendants knew each other well and the criminal venture was far from indefinite. The relationships between and among the racketeering Defendants and their co-conspirators defy brief iteration. For example, Bowers, Gleason and Daggett sit atop the ILA together, and have also served together as MILA Trustees. Racketeering Defendant Anthony "Sonny" Ciccone was a high-ranking ILA Official and is well-known by Bowers. Bowers, Gleason, Daggett and racketeering Defendant Arthur Coffey served on the Executive Council and on the MILA Board of Trustees with co-conspirator Frank "Red" Scollo, who pleaded guilty to conspiracy to violate RICO with Ciccone and racketeering Defendant Jerome Brancato with respect to, *inter alia*, the ILA elections scheme and the MILA PBM scheme. Bowers and Barone served on the ILA Executive Council together. Barone, Bowers, Gleason, Daggett and racketeering Defendant James Cashin have known one another for many decades. Daggett and Scollo were Trustees of the METRO-ILA Funds at the same time. Daggett and co-conspirator Andrew Gigante are friends. Bowers, Gleason, Daggett, Ciccone, Cashin, Scollo, Ciccone, and Barone were all defendants in the ILA Local Civil RICO case and identified then, as now, as members or associates of organized crime.

The criminal venture which these individuals embarked upon, with other co-conspirators specifically identified in the Complaint, SAC ¶¶ 41-50, was nothing less than to conspire to control, and conduct the affairs of, the Waterfront Enterprise. For Bowers, Gleason, Daggett and Ciccone, it was a reprise of the venture that was the subject of the ILA Local Civil RICO. To the extent that this latest venture can be considered indefinite, notwithstanding the Defendants' close relationships and their prior conduct relative to the Enterprise, there can be no reasonable doubt at this stage of the case that, for each of the racketeering Defendants, his involvement in the venture fell within the common purposes of the venture as understood by each.

Confronted with the proceedings in Bellomo, Gotti and Coffey, which revealed Waterfront racketeering resulting in pleas and convictions of ILA Officers and fund trustees, as well as members and associates of both the Genovese and Gambino families, the Defendants argue the Complaint fails to state a claim because it identifies not one conspiracy but multiple conspiracies. See ILA Mem. at 22-23; see also Bowers Mem. at 24-27. The argument is not surprising given the significance of the convictions. The RICO conspiracy convictions of Peter Gotti, Ciccone and Brancato in Gotti, for example, establish the existence of a racketeering conspiracy based upon many of the very schemes identified in the Complaint in this action. This fact facilitates proof that they and the other racketeering Defendants in this case – Bowers, Gleason, Daggett, Coffey and Cashin – were part of the single conspiracy pleaded in this case. See United States v. Casamento, 887 F.2d 1141, 1156 (2d Cir. 1989) (noting that "once a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming").

To reconcile their theory of the case with the Bellomo, Gotti and Coffey convictions, the Defendants partition the pattern of racketeering acts, for example, by referring to certain acts as "Ciccone acts." ILA Mem. at 22-23. Having minced the pattern in this way, the Defendants conclude that there was no common objective among the racketeering Defendants, i.e., no agreement to violate RICO. As part of this argument, the Defendants suggest that, at best, the United States has improperly pleaded multiple conspiracies that do not amount to RICO conspiracy. See Bowers Mem. at 24-27; ILA Mem. at 22-23.[15]

As discussed, the Complaint in clear terms alleges that the racketeering Defendants conspired to violate RICO; it does not allege that the Defendants entered into multiple conspiracies. Beyond this, the question of whether the evidence in a particular case establishes that defendants have entered into a single conspiracy or multiple conspiracies is a question of fact not suited for resolution at this stage of the litigation where defendants have made pre-answer motions and obtained a stay of discovery. See United States v. Maldonado-Rivera, 922 F.2d 934, 962 (2d Cir. 1990) ("the question of whether one or more than one conspiracy has been established is a question of fact for a properly instructed jury . . . ."). Regardless, the Defendants' factual recasting is unavailing.

A pattern of subagreements that might otherwise constitute multiple conspiracies may be joined in a single RICO conspiracy if the defendants have agreed to commit an overarching substantive RICO offense. United States v. Maloney, 71 F.3d 645, 664 (7th Cir. 1995) (ruling that the RICO conspiracy section, 18 U.S.C. § 1962(d), "is capable of providing for the linkage in one proceeding of a number of otherwise distinct crimes and/or conspiracies through the concept of enterprise conspiracy."); United States v. Riccobene, 709 F.2d 214, 224-25 (3d Cir. 1983) (holding that "Congress intended that a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy") (quoting United States v. Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981)); Sutherland, 656 F.2d at 1194 (holding that "a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count . . . ."). "So long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they all do not conspire directly with each other 'does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies.'" United States v. Friedman, 854 F.2d 535, 562-63 (2d Cir. 1988) (quoting United States v. Persico, 621 F. Supp. 842, 856 (S.D.N.Y. 1985)); see also United States v. Alkins, 925 F.2d 541, 554 (2d Cir. 1991) (citing Friedman, 854 F.2d at 562-63).

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[15] As indicated in note 14 supra, Peoni and other cases relied upon by racketeering Defendant Bowers concern post trial review of the sufficiency of evidence to determine whether the evidence was sufficient to support a conspiracy charge in a criminal case. These cases necessarily pose issues not presented in this case. This fact is highlighted by United States v. Adamita and other cases relied upon by the Defendants which concern the question of whether the evidence at trial proved multiple conspiracies, as opposed to one conspiracy as charged in a criminal indictment. The analysis of "variance" in these cases is, in this instance, a Procrustean fit, precisely because it is a function of the proof that has been offered at trial in a criminal case. This case is brought pursuant to the civil provisions of RICO, 18 U.S.C.§ 1964(a). Moreover, not only has there been no trial in this case but discovery has been stayed at the request of Defendants. Additionally, the question of whether a jury might convict a defendant of conspiracy based upon evidence which proves a different conspiracy has no meaning in this case which will be tried to the bench. In any event, the issue of sufficiency of evidence to prove conspiracy is a question of fact, United States v.Maldonado-Rivera, 922 F.2d 922, 962 (2d. Cir. 1990) and, upon review, the evidence must be considered in the light most favorable to the government, see, e.g., United States v. Berger, 224 F.3d 107, 114 (2d Cir. 2000).

Thus, "[u]nder RICO it is irrelevant whether 'each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.'" Friedman, 854 F.2d at 562 (quoting United States v. Stratton , 649 F.2d 1066, 1074 (5th Cir. 1981)). Accord Zichettello, 208 F.3d 72 100. "Coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan," and "[t]he goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes." Maldonado-Rivera, 922 F.2d at 963. "Nor do lapses of time, changes in membership, or shifting emphases in the locale of operations necessarily convert a single conspiracy into multiple conspiracies . . . [i]ndeed, it is not necessary that the coconspirators know all the identities of all the other conspirators in order for a single conspiracy to be found . . . ." Id. (citations omitted).

The lesson of these "multiple conspiracy cases," applied here, is that the schemes which were the expression of the Defendants' conspiracy to violate RICO fit neatly into a single conspiracy to violate § 1962(c), as reflected by the conspiracy convictions in Gotti.[16]

2. The Facts Show That Bowers and Gleason Conspired

Bowers and Gleason argue that the Compliant fails to adequately allege sufficient facts in support of the United States' claim that they conspired to violate RICO.[17] They are mistaken.

In the teeth of hard evidence of mob infiltration, the ILA's Executive Council, under Bowers' leadership, and during Gleason's tenure, has done nothing. See SAC ¶¶ 20, 51-71, 64.[18]

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[16] The decision in Adamita, as recounted in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), see Bowers Mem. at 24-27, offers no additional insight. In that case, the district court addressed motions to dismiss an indictment charging, *inter alia*, a narcotics conspiracy. The district court granted the motions as to some, but not all, defendants, including defendants Calderone and Catalano. As noted by Defendant John Bowers, Calderone and Catalano were "non-core" defendants. Bowers Mem. at 24. As the district court's comments indicate, the evidence adduced at trial did not sufficiently link either defendant with the conspiracy with which they were charged, although at least one of these defendants could have been properly charged with a lesser conspiracy. 917 F.2d at 718-19. In this case, there can be no reasonable argument that any of the racketeering Defendants is a "non-core" defendant. Moreover, it is noteworthy that the district court did not dismiss the Adamita indictment as to other defendants. In other words, it appears that the conspiracy count was found sufficient as to core defendants.

[17] The Defendants cite numerous other cases for the proposition that "barebones" pleading of RICO conspiracy will not suffice. See, e.g., Bowers Mem. at 23-24. These cases understandably rule that where there are no facts from which an agreement to violate RICO may be inferred, the mere allegation that the defendants entered into a conspiracy will not be adequate. See e.g., Nasik Breeding & Research Farm Ltd., v. Merck & Co., 165 F. Supp. 2d 514, 541 (S.D.N.Y. 2001); Congregacion de la Mision Provincia de Venezuela v. Curi, 978 F. Supp. 435, 451 (E.D.N.Y. 1997) (citing Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 249 (E.D.N.Y. 1993) (Glasser, J). The facts in these cases bear no resemblance to those presented here, which include, *inter alia*, decades-long relationships among the Defendants, long-term membership or association with organized crime, and a prior conviction for RICO conspiracy involving many of the same schemes pleaded in this case.

[18] As pointed out by Judge Martin in the Local ILA Civil RICO case, when confronted with new allegations of further corruption at Local 1588 in 2002 – fully ten years after Local 1588 entered into a consent decree in that case – the ILA, led by John Bowers and the other ILA executive officers, did nothing to address this corruption. As the court noted, given the ILA's leadership's "total lack of concern about the corruption in Local

The Complaint asserts, and the record to date in this case confirms, that the reason for this inaction is evident: numerous members of the Executive Council have been associates, or even members, of organized crime, including Bowers and Gleason. SAC ¶¶ 18, 20.

As two of the most powerful men in the ILA, Bowers and Gleason have been at the center of the conspiracy whereby the Genovese and Gambino families controlled the Waterfront, including the ILA. By virtue of their direct involvement in long-term acts of Waterfront Racketeering, including the schemes alleged in this case, it is clear that Bowers and Gleason were, at a minimum, aware of the general contours of the conspiracy of which they were a part.[19] This conspiracy fit squarely within the construct of the Waterfront Enterprise, which includes a sharing of control, influence and money by and among the members and associates of the Genovese and Gambino families. Thus, while the evidence at trial may ultimately show that Bowers and Gleason may not have known everything that their co-conspirators were doing, Bowers and Gleason certainly knew what they were "up to."[20]

1588 until it learned that it might be the subject of a government lawsuit, the Court ha[d] no reason to believe that [a] recent flurry of activity represent[ed] a genuine concern for the welfare of the Union's members or a desire to rid the Union of organized crime's influence." See Complaint at ¶ 64.a.

[19] Defendants Daggett and Coffey have made no specific challenge to the conspiracy claim. Nonetheless, the facts clearly support the claim against them. Like Bowers and Gleason, Daggett was a defendant in the ILA Local Civil RICO case, and has long known that he is a part of a larger venture which controls the Waterfront, a venture in which he agreed to personally to commit or otherwise facilitate several key schemes. Coffey has been part of this venture for decades as well, and has been an important agent for George Barone, including with respect to several of the racketeering acts alleged in this case. It goes without saying that Ciccone and Brancato played instrumental roles of the racketeering conspiracy alleged here; indeed they were found guilty in Gotti of conspiring to violate RICO with respect to the great majority of the schemes alleged in this action. The same clearly applies to Defendant James Cashin, who was a key agent for Waterfront racketeer Barone, was a Defendant in the ILA Local Civil RICO, and was one of the architects of several of the racketeering acts alleged in this case.

[20] Bowers and Gleason, as well as, Daggett and Coffey, ceded authority to Ciccone with respect to Waterfront affairs in Staten Island and Brooklyn and, for example, Locals 1 and 1814. This constituted a breach of the affirmative fiduciary duties which they owed to their membership. See United States v. Local 1804-1, International Longshoremen's Ass'n, 812 F. Supp. at 1339; United States v. District Council, 778 F. Supp. 738, 751 (S.D.N.Y. 1991). Their consent to Ciccone's activities was wholly in accordance with, and further evidence of, the

In exchange for their work on behalf of the Genovese family, Bowers and Gleason have been well paid, receiving high salaries and valuable pension and welfare benefits. In the past year, the membership of the ILA paid Bowers and Gleason in excess of $400,000. They have been similarly compensated in prior years. See SAC ¶¶ 17, 20. Ostensibly, Bowers and Gleason have received their salaries and benefits as compensation for representing the ILA membership in accordance with the mandate of the ILA Constitution, see SAC ¶ 16, and their fiduciary duties under federal law, see 29 U.S.C. § 501(a). In fact, by associating themselves with organized crime, Bowers and Gleason were acting to further the purposes of the Waterfront Enterprise, rather than their fiduciary obligations. In so doing, they ensured that they would remain leaders of the ILA and of the Waterfront Enterprise. See SAC ¶ 75.[21]

Eventually, after years of investigations and prosecutions of fellow ILA officials and others for Waterfront racketeering, Bowers and Gleason became racketeering defendants themselves in the ILA Local Civil RICO. SAC ¶ 59 Ex. 8. Each was charged with violating RICO by conducting or participating in the conduct of the affairs of the Waterfront Enterprise and by acquiring or maintaining an interest in the Waterfront Enterprise. They were charged with conspiring to violate RICO as well. Prior to trial, they entered into consent decrees pursuant to which they were enjoined from associating with members or associates of organized crime. SAC

arrangement between the Genovese and Gambino families which provides that the Gambino family will "take care of Staten Island and Brooklyn." United States v. Gotti, 459 F.3d 296, 302 (2d Cir. 2006) (quoting testimony of George Barone). SAC¶ 79.

[21] The relationship of a union fiduciary with organized crime places that fiduciary in opposition to his employer and union members, and constitutes a conflict of interest; as one court succinctly stated: "[i]n any given situation, an officer with ties to LCN will be tempted to place the interests of organized crime ahead of the welfare of the general membership. United States v. Int'l Bhd. of Teamsters, 792 F. Supp. at 1353.

¶ 59.e.[22] Notably, Harold Daggett, as well as other Defendants in the instant racketeering suit, were defendants in the ILA Local Civil RICO case as well.[23]

In the end, the conduct underlying this action (which, like the ILA Local Civil RICO case, names Bowers, Gleason, and many of the defendants from that case) has been a clearly foreseeable reprise of what has gone before. This conduct evinces an agreement – indeed a continuing commitment – by the Defendants to conduct the affairs of the Waterfront Enterprise through a pattern of racketeering activity.

The record is replete with facts that the racketeering Defendants conspired to violate RICO. To the extent that any argument can be made that a particular conspirator may not have been involved in every aspect of the conspiracy, it must be acknowledged that the United States need not so prove. Although there is remarkable evidence supporting the existence of conspiracy in this case, the United States need not prove every detail of conspiracy or that the racketeering Defendants knew each and every detail. The reason for this is simple. As stated by the Supreme Court:

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[22] The Complaint in the ILA Local Civil RICO specifically charged Bowers, along with Harold Daggett and James Cashin, with aiding and abetting the extortion of the rights of the members of Locals 1804-1 by George Barone, Douglas Rago and others. The rights which they extorted included:

> the right of union members to free speech and democratic participation in internal union affairs as guaranteed by Section 411 of Title 29, United States Code: to loyal and responsible representation by their union officers as guaranteed by Section 501(a) of Title 29, United States Code, and to loyal and responsible representation by the fiduciaries of ILA Benefit Funds covering Local 1804-1 members as guaranteed by sections 1104 and 1106 of Title 29, United States Code. . .

SAC Ex. 8, ¶ 76. Bowers and Cashin were similarly charged with aiding and abetting Barone and Rago in the extortion of the same rights from the membership of ILA Local 1588, SAC Ex. 8, ¶ 80, and Bowers and Robert E. Gleason were charged with having aided and abetted the extortion of these rights from the membership of Locals 1809, 1909, and 824, SAC Ex. 8, ¶104. Bowers was also charged with taking a labor payoff while an officer of ILA Locals 1809, 1909 and 824, SAC Ex. 8, ¶ 101. Bowers and Gleason, were further charged with having aided and abetted labor payments in connection with Locals 1809, 1909 and 824. SAC Ex. 8, ¶ 102.

[23] These were: (1) George Barone, who served with Bowers on the ILA's Executive Council and held other positions within the ILA, including President of ILA Local 1992 and Business Agent for Local 1804-1; (2) James Cashin, a former official with Local 1804-1 and Genovese family associate; and (3) Anthony, Ciccone, SAC ¶ 55.e. Notably, Barone and Ciccone were made members of Genovese and Gambino families, respectively, while they served as high-ranking ILA Officials. See SAC ¶ 59.e.

> For it is most often true, especially in schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undisclosed and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all of its detail or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 556-67 (1947).

V. THE SECOND AMENDED COMPLAINT ADEQUATELY PLEADS FRAUD.[24]

Defendants Bowers and Gleason argue that the Complaint does not adequately plead predicate acts of mail and wire fraud. The Defendants' arguments are off the mark.[25]

A. The Complaint Pleads Mail and Wire Fraud

The essential elements of a mail or wire fraud violation are: (1) a scheme to defraud; (2) money, property, or honest services as the object of the scheme; and (3) use of the mails or wires to further the schemes. See Gotti, 459 F.3d at 330-331; see also Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004) (quoting United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996); United

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[24] The Complaint alleges that Defendants Brancato, Cashin and Ciccone committed acts of extortion. None of these defendants challenges the pleading sufficiency of the extortion acts. Notably, in United States v. Gotti, 459 F.3d 296 (2d Cir. 2006), the Second Circuit upheld the extortion convictions of Brancato and Ciccone for the same conduct alleged in this case. SAC ¶¶ 118, 124, 181, 187, 299, 305, 345, 351, 368, 373, 399, 405-415, 431, and 436; see also SAC Exs. 6 and 7. In doing so, the Second Circuit ruled that the Hobbs Act "'does not limit the definition of extortion to those circumstances in which property is obtained through the wrongful use of fear created by implicit or explicit threats, but instead leaves open the cause of fear,' and . . . that the required showing is that the 'defendant must knowingly and willfully create or instill fear, *or use or exploit existing fear* with the specific purpose of inducing another to part with his or her property.'" 459 F.3d at 332-33 (quoting United States v. Abeles, 146 F.3d 73, 83 (2d Cir. 1998))(emphasis added). In accordance with the ruling in Gotti, the United States should not be required to prove at trial, much less at this juncture, that the extortion predicates identified in the Complaint involved the making of a direct threat by Brancato, Cashin or Ciccone. Indeed, as previously observed with respect to the ILA itself, "[w]here a union has a long history of corruption, 'fear can be invoked in subtle and indirect ways.'" United States v. Local 1804, Int'l. Longshoremen's Ass'n, 812 F. Supp. at 1343 (quoting United States v. Local 560, 780 F.2d 267, 288 n.24 (3d Cir.1986)). The Complaint also alleges that Ciccone and Brancato engaged in acts of money laundering conspiracy and money laundering. They were convicted of these crimes in Gotti and their convictions were upheld on appeal. SAC ¶¶ 378, 385; see also SAC Exs. 6 and 7. Ciccone and Brancato have not challenged the sufficiency of the pleading of these acts.

[25] The Complaint alleges that Defendants Brancato, Cashin, Ciccone, Coffey and Daggett committed fraud as well. SAC ¶¶ 84-112, 127-37 (ILA 2000 elections fraud)(Brancato, Cashin, Ciccone, Coffey and Daggett); SAC ¶¶ 138–74, 190-202 (MILA PBM fraud)(Cashin, Ciccone, Coffey and Daggett); SAC ¶¶ 138-43, 203-23 (MILA mental health care benefits contract fraud)(Cashin, Coffey and Daggett); SAC ¶¶ 224-45 (METRO-ILA Funds investment advisor scheme)(Daggett); SAC ¶¶ 224-25, 246-56 (METRO-ILA Welfare Fund PBM fraud)(Daggett); SAC ¶¶ 257-67 (METRO-ILA Welfare Fund mental health care benefits contract fraud)(Daggett); SAC ¶¶ 268-81 (Local 1922 Health and Welfare Fund and Southeast Florida Ports Welfare Fund mental healthcare contract frauds)(Cashin and Coffey); SAC ¶¶ 282-301, 308-14 (control over Local 1)(Ciccone); SAC ¶¶ 315-35 (fraud on the Local 1814 membership)(Ciccone). None of these defendants makes a specific pleading challenge. In Gotti, Brancato and Ciccone were convicted of the fraud predicates alleged against them in this case.

States v. Pierce, 224 F.3d 158, 165 (2d Cir. 2000); United States v. Walker, 191 F. 3d 326, 334 (2d Cir. 1999); United States v. Coffey, 361 F. Supp. 2d 102, 112 (E.D.N.Y. 2005).

"The scheme-to-defraud element is construed broadly to encompass 'everything designed to defraud by representations as to past or present, or suggestions and promises as to the future.'" United States v. Reifler, 446 F.3d 65, 95 (2d Cir. 2006)(quoting United States v. Altman, 48 F.3d 96, 101 (2d Cir. 1995)). Moreover, although use of the mails or wires is an essential element, the matter or communication sent by the mails or wires need not itself contain false or misleading information or evidence fraud. Rather, "'innocent' mailings – ones that contain no false information – may supply the mailing element," Schmuck v. United States, 489 U.S. 705, 715 (1989) (citing Parr v. United States, 363 U.S. 370, 390 (1960)), and "innocent" wire communications may satisfy the wire requirement, United States v. Reifler, 446 F.3d 65 at95 [26]

The requirement that the mailing or wire transmission be "in furtherance" of a scheme to defraud is to be construed flexibly as well. It is sufficient, then, that the mailing or wire transmission was "incident to an essential part of the scheme . . . or 'a step in [the] plot.'" 489 U.S. at 711 (quoting Badders v. United States, 240 U.S. 391, 394 (1916)). Thus, the mailing or wire transmission need not be essential to the scheme or succeed in deceiving, rather it need only be "for the purpose of executing the scheme." United States v. Maze, 414 U.S. 395, 400 (1974). "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive . . . ." Schmuck, 489 U.S. at 715.

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[26] Thus, for example, a routine mailed inquiry from an insurance company after an arson qualifies as a sufficient "mailing"for the purposes of mail fraud. See United States v. Tocco, 135 F.3d 116, 125 (2d Cir. 1998).

Proof that a defendant personally mailed the matter or made the wire transmission or specifically knew about or intended the mailing or transmission to occur is unnecessary. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Pereira v. United States, 347 U.S. 1, 8-9 (1954); see Reifler, 446 F.3d at 96 (quoting and applying Pereira in wire fraud case). Accord Maze, 414 U.S. at 400. "Moreover, to violate the statue, the defendant need not have completed or succeeded in his scheme to defraud, and the scheme need not have resulted in actual injury to the scheme's victims." Reifler, 446 F.3d at 96.

Bowers and Gleason each committed acts of mail and wire fraud and the Complaint pleads each element of these predicates within the meaning of 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively.

Both Bowers and Gleason engaged in the rigging of the 2000 ILA elections of Harold Daggett and Louis Pernice, SAC ¶¶ 84-113, 127-37, concealing "their longstanding associations with organized crime" and "the material fact that they were working on behalf of the interests of organized crime by ensuring that organized crime associates were placed in top-level ILA positions . . . ." SAC ¶ 131. Thus, Bowers and Gleason defrauded the ILA membership of "property consisting of ILA union positions occupied by Daggett and Pernice, as well as the wages and accompanying employee benefits associated with these positions." SAC ¶ 131. In addition, Bowers and Gleason "defrauded the ILA members of their right to the honest services" of Bowers and Gleason. Id. The Complaint identifies the other individuals with whom Bowers and Gleason committed this fraud, including Defendants Arthur Coffey, Harold Daggett, Anthony Ciccone, Jerome Brancato and James Cashin, and Co-conspirators Primo Cassarino and Frank Scollo. SAC ¶¶ 133-37. The Complaint details two telephone calls made in furtherance of the scheme. SAC ¶ 133.

The Complaint establishes that Bowers directly participated in the MILA PBM fraud. SAC ¶¶ 138-74, 190-202. As part of this fraud, Bowers concealed his "longstanding association[ ] with organized crime during the award of the MILA PBM contracts and concealed the material fact that [he] was working on behalf of the interests of organized crime by supporting the award of the contracts to GPP/VIP." In doing so, Bowers defrauded MILA and its participants and beneficiaries "of property consisting of money and economic benefits by affecting their understanding of the bargain" in the award of the MILA PBM contracts to GPP/VIP. SAC ¶ 194. Additionally, Bowers defrauded MILA, its participants and its beneficiaries of their right to his honest services. SAC ¶ 194. The Complaint identifies the other individuals with whom Bowers committed this fraud, including Defendants Harold Daggett, Arthur Coffey, Anthony Ciccone, and James Cashin, and Co-conspirators Albert Cernadas, Primo Cassarino and Frank Scollo. SAC ¶¶ 196-202. The Complaint details three telephone calls made in furtherance of the scheme. SAC ¶ 196.

Bowers and Gleason also directly participated in the fraudulent award of the MILA mental health care benefits contract. SAC ¶¶ 203-223. Again, they "concealed their longstanding associations with organized crime during the award of the MILA mental health care contracts, and concealed the material fact that they were working on behalf of the interests of organized crime, by supporting the award of the contracts to the company by which Cashin was employed." They did so to "defraud MILA and its participants and beneficiaries of property consisting of money and economic benefits by affecting the understanding of the bargain in such benefit plan-related transactions and to defraud MILA and its participants and beneficiaries of their right to the honest services" of Bowers and Gleason. SAC ¶ 220. The Complaint identifies the other individuals with whom Bowers committed this fraud, including Defendants Harold Daggett, Arthur Coffey, and James Cashin. SAC ¶ 222. The Complaint details eight mailings made in furtherance of the scheme. SAC ¶ 223.

In sum, the Complaint adequately pleads all the necessary elements of mail and wire fraud.

B. The Complaint Pleads Sufficient Facts

Bowers and Gleason charge that the mail and wire allegations against them do not satisfy Rule 9(b) of the Federal Rules of Civil Procedure. This is plainly untrue.

Rule 9(b) of the Federal Rules of Civil Procedure provides that:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be generally averred.

Fed. R Civ. P. 9(b). The rule is "designed to further three goals: (1) providing a defendant fair notice of plaintiff's claim, to enable preparation of defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits." DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987). Although the pleading requirements of Rule 9(b) are distinct from those set forth in Rule 8, Rule 9(b) must be read in the context of the liberal notice pleading requirements of Rule 8. See id.; see also IUE AFL-CIO Pension Fund v. Hermann, 9 F.3d 1049, 1057 (2d Cir. 1993).

The Complaint conforms with the Rule and effects its purposes. The allegations place Bowers and Gleason on notice that they are charged with having defrauded the ILA membership and MILA beneficiaries with respect to specific transactions, occurring during specifically identified time-frames, together with other defendants and co-conspirators who are specifically identified. The Complaint squarely states that Bowers and Gleason acted on behalf of the interests of organized crime and concealed this fact, all in breach of specifically identified fiduciary duties which they owed to the ILA membership and MILA beneficiaries. SAC ¶¶ 84-112, 127-37 (ILA 2000 election fraud); SAC ¶¶ 138–74, 190-202 (MILA PBM fraud); SAC ¶¶ 138-43, 203-23 (MILA mental health care benefits contract fraud).

The Complaint also establishes that Bowers and Gleason acted with the requisite intent to defraud. To plead intent under the Rule, the United States must only "allege a motive for committing fraud and a clear opportunity for doing so." See Powers v. British Vista, P.L.C., 57 F.3d 176, 184 (2d Cir. 1995).[27] As associates of organized crime, Bowers and Gleason quite obviously had motive to commit fraud on the ILA and its funds.[28] Bowers and Gleason maintained their status as powerful, well-compensated union officials by doing the mob's bidding. SAC ¶¶ 75-76. They also had clear opportunity to commit fraud.

As explained by the Second Circuit:

> When courts speak of "clear opportunity" to commit fraud . . . the usual finding . . . arises when the defendant is already well positioned to carry out the fraudulent transaction, such as when he possesses the necessary trust and authority. See Turkish v. Kasenetz, 27 F.3d 23, 28 (2d Cir.1994) (holding that, as fiduciaries of the plaintiff trust, defendants had a clear opportunity to commit fraud); Jaquith v. Newhard, 1993 WL 127212 at *7 (S.D.N.Y. Apr. 20, 1993)

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[27] Alternatively, fraudulent intent may be inferred from "circumstances indicating conscious behavior." Powers, 57 F.3d at 184. The totality of their actions and omissions clearly evince conscious behavior by Bowers and Gleason.

[28] The same obtains with respect to Cashin, Coffey and Daggett, as well as to mob members Brancato and Ciccone.

> (defendant's position as president of company gave him a clear opportunity to misrepresent its value in order to induce plaintiff's loan).

Powers, 57 F.3d at 185. In their positions as Executive Officers of the ILA, with the ability to control the actions of other members of the ILA Executive Council, SAC ¶ 26, Bowers and Gleason were uniquely placed to commit the 2000 ILA election fraud. Equally, as MILA Trustees, they had the power to bring about the MILA frauds, as charged. Both as ILA officials and MILA Trustees, each owed fiduciary duties to the ILA membership and MILA beneficiaries, further emphasizing that they had "clear opportunity" to engage in the fraudulent schemes. See Turkish v. Kasenetz, 27 F.3d at 28 (fiduciaries of trust had clear opportunity to commit fraud).[29]

As made plain by their briefs, Bowers and Gleason premise their particularity challenges on their own view of the facts rather than the facts as pleaded. Instead of addressing the allegations in the Complaint, much less accept the pleaded allegations as true, Bowers, in particular, writes his own set of facts, which he then determines are insufficient to support the United States' claims.

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[29] As stated, Daggett and Coffey have not made specific challenges to the Complaint, much less to the pleading of the predicate acts which they committed. It is worth noting nonetheless that each was a high-ranking ILA official with a clear opportunity to commit the ILA 2000 election fraud. Similarly, as MILA Trustees, they had clear opportunity to engage in the MILA PBM fraud and the MILA mental health care benefits contract fraud. The same obtains with respect to the schemes involving Daggett and the METRO-ILA Funds, and to Coffey, with respect to the Local 1922 Welfare Fund and Southeast Florida Ports Funds. Each owed a fiduciary duty to the funds by virtue of positions they held. Specifically, Daggett was an officer of the ILA's Atlantic & Gulf Coast District and President of ILA Local 1804-1, as well as a METRO-ILA Fund Trustee, at the time of the METRO-ILA Fund frauds. Similarly, Coffey was an officer with the ILA's South Atlantic & Gulf Coast District and President of ILA Locals 1922, 1922-1 and 2062, as well as a Trustee of the Local 1922 Welfare Fund and the Southeast Florida Ports Welfare Fund, when these funds awarded contracts to ComPsych. He was also a member of the ILA's Executive Council and, for a time, a MILA Trustee. He thus had clear opportunity to participate in the Daggett election fraud as well as the MILA PBM fraud. Additionally, Daggett and Coffey, as well as Bowers, Gleason, Albert Cernadas and Frank Scollo, gave access to the ILA and its funds to Defendants Cashin, Ciccone, and Brancato. As a result, Cashin, Ciccone and Brancato also had clear opportunity to commit the frauds with which they are charged.

For example, with respect to his crucial role in the rigged election of Harold Daggett to the ILA Executive Council as ILA Assistant General Organizer, Bowers posits:

> Mr. Bower's (sic) sole involvement in this racketeering scheme was his presence at a meeting arranged by Mr. Barone. SAC ¶ 87.

Bowers Mem. at 14. Bowers' attempt to limit his role in the ascension of Harold Daggett to the Executive Council and toward the presidency of the ILA, evinces the brazen disregard that the Defendants have generally for the facts in the Complaint and for the notion that they may be held accountable for their conduct. A meeting between the President of the ILA and a convicted racketeer to discuss the succession of officers within the ILA could never be anything but important. Indeed, as alleged in the Complaint, "[b]y communicating with Barone, Bowers violated the terms of the March 26, 1991 Consent Judgment that he had signed in the ILA Local Civil RICO . . . ." SAC ¶91.

In any event, Bowers ignores that, at the meeting with Barone, "Bowers agreed to support Daggett provided that Barone agreed to be personally responsible for Daggett and that Bowers' son, John Bowers, Jr., would be taken care of." SAC ¶ 90. Bowers also avoids the allegation that he discussed the possible political repercussions of supporting Daggett for the position of General Organizer with Barone, and obtained approval from Barone to put Daggett in the Assistant General Organizer position instead. SAC ¶¶ 102-03. And, Bowers ignores another key fact: that the ILA Executive Council, which Bowers headed, voted unanimously to place Daggett on the ILA Executive Council in a non-Convention year election, just as planned by the Genovese and Gambino families. SAC ¶¶ 95-100, 104-112.

Bowers further asserts:

> Nor is there any allegation that Mr. Daggett – who had served as president of the ILA's most powerful locals – was an inappropriate selection for the job of Assistant General Organizer, a position that he ultimately assumed.

Bowers Mem. at 14.

In fact, the Complaint alleges that Daggett is a Genovese family associate, SAC ¶ 19, who: "had been placed" in ILA positions by Barone, SAC ¶ 88; could be counted upon to advance Genovese family interests, SAC ¶ 88; was considered a "golden goose" by organized crime because he was the President of two of the ILA's most important locals, SAC ¶ 88; and was the choice of organized crime to become Assistant General Organizer, SAC ¶¶ 93-112. To any reasonable person, these facts would surely disqualify Daggett from playing any role in the ILA, much less from serving on its governing Executive Council. Bowers' inability to acknowledge that these facts establish that Daggett was "an inappropriate selection for the job of Assistant General Organizer," emphasizes the lengths to which Bowers will go to defend his own complicity with organized crime.

Bowers goes on:

> More fundamentally, the government's overarching assertion that Mr. Bowers acceded to the Genovese family demand that Mr. Daggett replace him as ILA president is flatly belied by the undisputed fact that, following his meeting with Barone, in 1999 – and again in 2003 – Mr. Bowers ran for and was re-elected to the ILA presidency.

Bowers Mem. at 14. This is yet another inaccurate restatement of the actual facts. The actual facts are that top ILA officers believed that Bowers, who by 1999 had been President for twelve years and had been ILA Executive Vice-President for twenty-four years, SAC ¶ 18, would be retiring ultimately:

> The question of ILA President JOHN BOWERS' ultimate retirement, and who would replace BOWERS, had been the subject [of] discussion among the ILA's top leadership, including Executive Vice-President Albert Cernadas, Secretary-Treasurer ROBERT E. GLEASON and HAROLD J. DAGGETT.

SAC ¶ 85. "The question of Bowers' ultimate retirement was also one of concern for the Genovese and Gambino families." SAC ¶ 86. Thus:

> Because control of the ILA through the union's top-ranking officers was crucial to the operation of the Enterprise, in or about June of 1999, George Barone, a Genovese family member, former ILA official, and convicted racketeer, arranged a meeting with ILA President JOHN BOWERS to discuss who would replace BOWERS as ILA President upon BOWERS' retirement.

SAC ¶ 97.

In other words, the entire context for the ascension of Daggett was that there had been discussion, indeed within the ILA itself, that Bowers would ultimately retire. The question presented was how to position Daggett, a Genovese associate, so that he could succeed Bowers, another Genovese associate, upon Bowers' ultimate retirement. This question was resolved by placing Daggett, as planned, on the ILA's Executive Council.[30]

Bowers' manipulation of the facts is not restricted to the rigging of the 2000 elections. With respect to the selection of GPP/VIP as MILA PBM, Bowers states that the Complaint:

> does not allege that Barone asked Mr. Bowers to support GPP/VIP or that he asked Cashin to relay that request to Mr. Bowers or that he even knew the name of the company to be recommended.

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[30] Notably, Bowers has now retired from the office of President, although he is still on the Executive Council and holds the title of President Emeritus of the ILA, see SAC ¶ 18. Harold Daggett is the Executive Vice-President of the ILA, and thus poised to become President of the ILA immediately upon the death, removal or resignation of the President without vote of the ILA membership. SAC ¶ 70.

Bowers Mem. at 18. The actual facts are that Bowers met with Genovese associate and former ILA officer James Cashin and that Cashin informed Bowers that "Barone supported Nasso's company, i.e., GPP/VIP, for the MILA PBM contract and to ask Bowers to support the company." SAC ¶ 155. It is also a fact that Bowers was Co-Chairman of the Board of Trustee of MILA and the lead MILA Union Trustee, SAC ¶ 141, and that he led the ILA Trustees in their support of GPP/VIP, a corporation that was owned by Dr. Vincent Nasso, for the award of the MILA PBM contract. SAC ¶¶ 147, 150.

Incredibly, Bowers further charges that the Complaint:

> does not allege that Mr. Bowers had any reason to know that the Genovese family would receive a payoff if GPP/VIP was selected . . . .

Bowers' Mem. at 18. Put another way, Bowers asks why he, a long-time associate of organized crime, who had entered into a consent decree which prohibited him from having dealings with organized crime members and associates, would have any reason to think that, when Cashin told him that Barone wanted GPP/VIP to get the MILA PBM contract, there could be something in it for organized crime? Why indeed. Bowers' argument defies any plausible reading of the facts.

Bowers further asserts that the Complaint:

> certainly does not allege that Mr. Bowers himself received any payoff from the selection of GIPP/VIP.

Bowers' Mem. at 18. This argument misses the point completely: neither Bowers, Gleason, Coffey or Daggett needed to receive any additional remuneration from his fraudulent conduct. As the Complaint asserts, they got and maintained their jobs, and the lucrative salaries and benefits that accompanied these jobs, through their association with organized crime. SAC ¶¶ 75-76.

In the same vein, Bowers contends that:

> Furthermore, when GPP/VIP informed MILA's pharmacy Resource Committee that it needed to increase its fees, MILA – with Mr. Bower's support – issued a new RFP to select a new PBM provider and voted to award the contract to a different company, Advance PCS. SAC ¶ 169.

Bowers Mem. at 18. And yet, the Complaint quite clearly states that the Union Trustees, of which Bowers was Chairman, changed position after Gambino Capo Sonny Ciccone objected to the award of the new PBM contract to Advance PCS. In fact, the Union Trustees supported GPP/VIP once again to the point where the matter had to be resolved through a deadlock arbitration proceeding. SAC ¶¶ 170-74.

Bowers' rendition of the facts in this case should be rejected in favor of the facts that are actually pleaded in the Complaint. These facts provide more than sufficient basis for fraud allegations made against Bowers, as they do with respect to Gleason.[31]

Although the Complaint in this action meets the pleading requirements of Rule 9(b) when viewed from any vantage, it must be noted that Bowers and Gleason in the main premise their challenges upon cases involving nothing more than garden variety business and securities disputes. See Bowers Mem. at 13, 19; Gleason Mem. at 30, 33. This case does not concern a mere business dispute, and it is not a securities "strike suit." It is, rather, a case predicated on crimes involving organized crime and fraudulent concealment of breaches of fiduciary duty.

Unlike the cases relied upon by Bowers and Gleason, United States v. Int'l Bhd. of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989) ("IBT"), which was predicated on similar allegations

[31] Gleason generally avers that the Complaint fails to allege "a single fact" that he "had the requisite intent to defraud." Gleason Mem. at 33. As discussed, *supra*, the Complaint sets forth facts which establish that Gleason had motive and clear opportunity to commit fraud and, thus, the requisite intent.

of breach of fiduciary duty by corrupt labor union officials in league with organized crime, is directly on point. In IBT, the court addressed a Rule 9(b) defense similar to the one mounted by Bowers and Gleason in this case. Specifically, the defendants challenged the particularity of wire fraud allegations concerning the elections of two IBT presidents. In response, the court ruled that the government's case differed significantly from securities cases involving fraudulent misrepresentations where "the question of timing and specificity becomes paramount . . . because liability is premised on who knew what when." 708 F. Supp. at 1396-97. In other words, the complaint did not "implicate the traditional concerns furthered by Rule 9(b)." Id. at 1397. Thus, the court ruled that, "[a]lthough Rule 9(b) applies to allegations of fraudulent concealment . . . the particularity required of such allegations differs from that required of allegations of fraudulent misrepresentations." Id. (citation omitted). Instead, in a fraudulent concealment case, Rule 9(b) is satisfied where, as here, the complaint "alleges the facts a defendant, who was under a duty to disclose, failed to reveal." Id.

The court also ruled:

> Further, by its nature, the alleged scheme places most of the particulars of the fraud in question in control of the defendants. Typically the plaintiff is the defrauded party, who has had direct dealings of some type with the defendant. In this case, Government is not the direct victim of the fraud allegedly perpetrated by the defendants. The Government is in the position of protecting the interests of the membership of the IBT as well as the public in an honest labor union. For all of these reasons, the Government has satisfied the requirements of Rule 9(b) with respect to the wire fraud allegations arising out of the elections . . . .

Id.[32]

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[32] Citing the Court's November 1, 2007 Memorandum and Order, Gleason contends that the Court has already addressed the sufficiency of the United States' pleading of the mail and wire fraud predicates, as set forth in the indictment in Gotti. Gleason Mem. at 31 and n.23. The Complaint, as amended, does not merely incorporate relevant allegations from the Gotti indictment and it adequately delineates Gleason's use of the mails and wires. See Pereira v. United States, 347 U.S. 1, 8-9 (1954). Moreover, the United States long ago produced to Gleason (as well as all other defendants) the mailings and wire communications identified in the Complaint. The

C. The Complaint Pleads Aiding and Abetting Liability.[33]

The Complaint alleges that, at a minimum, Bowers aided and abetted the 2000 ILA elections fraud, the MILA PBM fraud and the MILA mental heath care benefits contract fraud. SAC ¶¶ 132, 195, and 221. Bowers contends that the Complaint "has failed to demonstrate even reckless conduct" by him and therefore fails to adequately allege that he aided and abetted the three racketeering acts. Bowers Mem. at 19. This argument has no merit.

A defendant's liability for personally committing a predicate racketeering act may be established by proof that the defendant aided and abetted the commission of the racketeering act. United States v. Rastelli, 870 F.2d 822, 832 (2d Cir. 1989). "Under 18 U.S.C. § 2, a defendant may be convicted of aiding and abetting a given crime where the government proves that the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime." United States v Reifler, 446 F.3d 65, 96 (2d Cir. 2006).

A defendant may be liable for aiding and abetting a crime even where he did not know all the details of the crime. Id. Similarly, "where the crime has more than one stage, the defendant may be convicted of aiding and abetting even if he did not learn of the crime at its inception but knowingly assisted at a later stage." Id. This principle "has been applied to charges

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Complaint otherwise alleges specific information concerning the nature of the mailings and wire transmissions. Thus, in addition to identifying the date and participants in the telephone calls that were made in furtherance of the ILA 2000 elections fraud, the Complaint sets forth, *verbatim,* part of one of the calls between then ILA Vice-President Frank Scollo and Gambino soldier Primo Cassarino in which they discussed the results of the elections, as reported by Scollo from the election site. SAC ¶¶ 111, 133. Similarly, the Complaint clearly identifies eight mailings made in furtherance of the MILA mental health care benefits contract fraud. Three of these mailings were made to Gleason himself by ComPsych, the company that received the contract. SAC ¶ 223.

[33] The Complaint also alleges that Coffey, Daggett and Gleason aided and abetted racketeering acts. They have not specifically challenged the sufficiency of the allegations.

of wire fraud, allowing a defendant to be convicted of that offense on an aiding-and-abetting theory even if the wire transmission preceded his conduct, so long as the fraudulent scheme was ongoing at the time of his conduct." Id.

Although the United States need not establish that persons other than Bowers have in fact been convicted of the crimes which Bowers aided and abetted, see Standefer v. United States, 447 U.S. 10, 15-20 (1999) (holding that a defendant may be convicted of aiding and abetting a crime even where the principal has been acquitted), there have been convictions with respect to two of the predicates which Bowers aided and abetted. Specifically, in Gotti, Defendants Brancato and Ciccone, and Co-conspirator Primo Cassarino, were convicted of wire fraud in connection with the ILA 2000 elections, SAC ¶ 135,[34] and Ciccone and Cassarino were convicted in connection with the MILA PBM fraud, SAC ¶ 198.[35] Thus, the requirement that a person other than Bowers committed these racketeering acts has been proved already.[36]

The other elements of aiding and abetting liability have been pleaded sufficiently as well. As a union official, Bowers, owed a fiduciary duty to the ILA membership. See United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 380 (2d Cir. 2001) (holding that "Union officials 'occupy positions of trust in relation to such organization and its members as a group.'"). Similarly, as a

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[34] As part of his guilty plea in Gotti, former ILA Vice-President Frank Scollo admitted he participated in this act. SAC ¶ 137.

[35] Scollo admitted in his Gotti plea that he participated in this act. SAC ¶ 2002. Former ILA Executive Vice-President Albert Cernadas pleaded guilty to conspiring to commit this act in Coffey. SAC ¶ 202.

[36] This obtains with respect to Coffey and Daggett who, like Bowers, have been charged with aiding and abetting both of these acts, and to Gleason, who aided and abetted the 2000 ILA elections fraud. SAC ¶¶ 132, 195. Additionally, Daggett is charged with having aided and abetted another crime as to which there have already been criminal convictions: the mail fraud involving the award of METRO-ILA Benefit Funds investment advisor contract, SAC ¶¶ 224-45,to which Co-conspirators Liborio Bellomo, Thomas Cafaro, Pasquale Falcetti and Michael Ragusa pleaded guilty in Bellomo.

MILA Trustee, Bowers owed a fiduciary duty to the beneficiaries of MILA. See United States v. Coffey, 361 F. Supp. 2d 102, 117 n.14 (E.D.N.Y. 2005) ("As officers and directors of the Funds, defendants owed them a fiduciary duty which was set forth in ERISA, including discharging their responsibilities for the best interests of the Funds and without conflict of interest.") (citing 29 U.S.C. §§ 1101, 1104, 1106). The Complaint alleges that Bowers breached these duties. SAC ¶¶ 132, 195, and 221. Indeed, he not only failed to act in the interest of the ILA membership and MILA beneficiaries, but he acted in his own interest and in the interest of organized crime, and fraudulently concealed this fact. SAC ¶¶ 131, 194, and 220. These acts and omissions provide sufficient basis to charge Bowers with aiding and abetting liability.[37] See United States v. District Council, 778 F. Supp. 738, 751 (S.D.N.Y. 1991); see also United States v. Local 1804-1, Int'l Longshoremen's Association, 812 F. Supp. at 1339; United States v. Int'l Bhd. of Teamsters, 708 F. Supp. at 1401.[38]

VI. THE UNITED STATES IS NOT ESTOPPED FROM NAMING BOWERS AND THE ILA AS DEFENDANTS

Both Bowers and the ILA argue that they were portrayed as victims in prior prosecutions and therefore cannot be named as defendants in this litigation. This point largely overlaps with arguments made in Point II (B) *supra*. While the United States will not repeat those

[37] This applies equally to Coffey, Daggett and Gleason, each of whom owed fiduciaries duties to the ILA membership and MILA beneficiaries, and acted contrary to these duties. SAC ¶¶ 132, 195, and 221. Coffey also breached fiduciary duties that he owed to the beneficiaries of the Local 1922 Health and Welfare Fund and Southeast Florida Ports Welfare Fund. SAC ¶ 275. Daggett breached the fiduciary duties he owed to the METRO-ILA Funds. SAC ¶¶ 239, 254, and 263.

[38] Citing District Council, Bowers argues that "the mere allegation that [he] breached his fiduciary duty is not enough to establish liability for aiding and abetting an offense." 778 F. Supp. at 738. The Complaint does more than allege that Bowers breached his duties to the ILA membership and to the beneficiaries of MILA. More to the point, though, District Council simply states that the United States will ultimately have to prove the elements of aiding and abetting at trial.

arguments previously made, it pauses here to emphasize the utter lack of merit presented by these positions advanced by the Defendants.

The Complaint alleges that, while he was the President of the ILA, John Bowers committed fraud upon the membership of the ILA. SAC ¶¶ 84-112, 127-37. The Complaint further alleges that, while Bowers was Co-Chair of the Board of Trustees of MILA, he committed fraud upon MILA's beneficiaries. SAC ¶¶ 138-74, 190-223. As a matter of law, these allegations are to be presumed true, but Bowers fights the import of this maxim, arguing that he is no wrongdoer but instead, a "victim." See Bowers Mem. at 34. This argument ignores the allegations in the Complaint which establish that Bowers has had a longstanding relationship with organized crime, from which he has benefitted greatly to the detriment of the ILA membership and MILA beneficiaries. See, e.g., SAC ¶¶ 17-18, 76, 90.

Bowers claims that he was once portrayed as "an alleged extortee" and is now characterized as "an alleged conspiring extorter." Bowers Mem. at 34. In point of fact, the Complaint does not assert that Bowers committed acts of extortion.[39] Because the Complaint charges that Bowers committed acts of fraud only (though serious ones, to be sure), Bowers necessarily posits that a person who perpetrates a fraud against one group (*i.e.* ILA members or MILA beneficiaries) cannot otherwise be the subject of extortion by still another person or group (*i.e.*, organized crime). Or, put another way, he argues that a person who has been the subject of extortion is necessarily, regardless of context, free of any criminal culpability. Bowers cites no law in support of this position.[40] Notably, however, "for purposes of the Wire Fraud Statute, fraud and extortion are not mutually exclusive. The mere fact that extortion may constitute one aspect of the transaction does not insulate the fraudulent representations and plan from prosecution as a scheme to defraud." Huff v. United States, 301 F.2d 760, 763 (5th Cir. 1962). At most, Bowers has articulated a possible factual defense on the merits, namely, that as a victim of extortion he cannot have held the requisite intent to commit a fraud or conspire to violate RICO.

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[39] Count One of the Complaint, which alleges a substantive violation of RICO, does not name Bowers as a defendant in the extortion predicates. He is, instead, identified as a defendant only in the fraud predicates.

Likewise, the ILA's argument that its characterization in this action is inconsistent with that previously put forth, ILA Mem. at 18-19, is baseless. For example, in Bellomo, the indictment alleged that:

> [the LCN Defendants] agreed . . . to obtain property, to wit: [ILA] labor union positions, and money, including wages and employee benefits, paid in regard to those labor union positions, from such union's members and officers, agents, delegates, employees and other representatives, with their consent, which consent was to be induced by wrongful use of actual and threatened force.

SAC, Ex.3 at ¶ 19. The Gotti indictment contained similar language, and it included allegations that LCN agreed to deprive ILA members of their right to free speech and democratic participation in the affairs of the union and of their intangible right to the honest services of their executive officers.

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[40] Bowers has suggested that these purportedly inconsistent theories may violate due process. As set forth above, the positions advanced are not inconsistent. In any event, there is no clear consensus among the courts that have addressed the issue that the use of inconsistent theories in successive prosecutions violates due process. See Thompson v. Calderon, 120 F.3d 1045, 1070 (9th Cir. 1997) (dissenting) (the law on inconsistent theories is "far from settled, much less 'well established'"), rev'd on other grounds, 523 U.S. 538 (1998); Urso, 369 F. Supp. 2d 254 ("no clear consensus" on incompatible theories). Neither the Second Circuit nor the Supreme Court have passed on the validity of such a due process claim. Boyle, 2007 WL 4102738. See also Bradshaw v. Strumpf, 545 U.S. 175, 191 (2005) (Thomas, J. and Scalia, J., concurring) ("[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories"). Moreover, the fact that the Second Circuit has permitted the government to proceed with allegedly inconsistent theories in criminal prosecutions, where one's very liberty was at stake, speaks volumes about the permissibility of proceeding with inconsistencies (should any exist) in this civil case. See United States v. Orena, 32 F.3d 704, 715-16 (2d Cir. 1994); United States v. Salerno, 937 F.2d 797, 810-12 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 317 (1992).

SAC, Ex.6 at ¶¶ 27, 28, 30, 32, 99, 100, 109. This is in no way inconsistent with the allegations here that the ILA as an institutional entity is either unwilling or unable to rid itself of mob influence. As such, the United States does not derive any unfair advantage from the Complaint; nor does this present a situation in which the "risk of inconsistent results" will have an "impact on judicial integrity." Uzdavines v. Weeks Marine, Inc., 418 F.3d 138, 148 (2d Cir. 2005). The United States has consistently maintained that LCN has infiltrated the ILA, and it continues to assert that position in this litigation. Indeed, beyond the ILA's mere rejoinder that the United States cannot play "fast and loose" with the courts, this case presents no threat to judicial integrity.

In sum, the United States has not taken inconsistent positions in this and previous litigations. While Bowers endeavors to twist the factual allegations of the Complaint, there is nothing contradictory about his having been extorted by the mob and, in turn, defrauding the union membership and fund beneficiaries. Regardless, even if there were some inconsistency, which has yet to be fleshed out in discovery, Bowers may offer evidence of any contradiction against the government at trial.

VII. THE DEFENDANTS' CHALLENGE TO THE REQUESTED REMEDIES IS PREMATURE AND ILL-FOUNDED

Several of the Defendants complain that the remedies sought in this case are over-reaching and unnecessary. See, e.g. MILA Mem. at 11; METRO Defendants Mem. at 15-25; ILA Mem. at 19, n. 12. These Defendants have put the cart before the proverbial horse. The issue in a motion to dismiss pursuant to Rule 12(b)(6) is not whether the requested relief is warranted given the, as yet, unproven facts, but whether the plaintiff has pled facts sufficient to proceed with the litigation. In other words, in a Rule 12(b)(6) motion, the Court must determine whether the plaintiff may even attempt to establish liability and its entitlement, if any, to relief. Nevertheless, the

Defendants throw up various reasons why they should not remain in this case. Specifically, the institutional defendants, with the METRO Defendants leading the charge, argue that they have not committed any crimes and that the requested relief is "unprecedented" and unduly expensive. See, e.g., METRO Defendants Mem. at 17, 23.

As this Court noted in the Private Sanitation litigation, "the provisions of RICO do envision a wide range of remedial mechanisms in civil RICO actions;" challenges to relief at the motion to dismiss stage are premature because "'the availability of any injunctive relief will depend upon the government's proof, and the Court has broad equitable powers under 18 U.S.C. § 1964 to fashion any injunctive relief to avoid constitutional infirmity.'" 792 F. Supp. at 1150 (quoting Bonnano, 683 F. Supp. at 1441-42). The Defendants' arguments are utterly without merit and, in any event, wholly inappropriate for resolution at this juncture.

A. Relief Against The ILA, MILA and the METRO Defendants

In an obvious effort to avoid the merits of this litigation, the ILA, MILA, and the METRO Defendants leapfrog over the allegations of wrongdoing and corruption and focus on the remedy requested by the United States. MILA Mem. at 11; METRO Defendants Mem. at 15-25; ILA Mem. at 19, n. 12. Implicit in their argument regarding remedy is the position that, because they are not formally accused of wrongdoing, they should not be forced to bear the expense of litigation and anticipated relief. Although this case stands in the posture of a Rule 12(b)(6) motion, without the benefit of complete discovery, as set forth above and as demonstrated by the well-pled allegations of the Complaint, the requested relief is necessary. As discussed above, each and every one of the these Defendants is properly included as a member of the Waterfront Enterprise. Further, each of them would be affected by the requested relief, and, as such, their participation in this litigation is necessary. None of the Defendants appear to argue that they have no interest in the outcome of this matter. Rather, they are directly affected by the remedies requested here, including a monitorship, the removal of trustees, and the oversight of expenditures and proposed decisions. SAC at pp. 139-49. Thus, under Rule 19 of the Federal Rules of Civil Procedure, the ILA, MILA, and the METRO Defendants are proper parties to this lawsuit.

The fact that this lawsuit alleges violations of the RICO statute does not alter this analysis. Indeed, "it is common practice in civil RICO cases to add as Nominal Defendants entities that are not themselves charged with RICO violations but that would be directly affected by the equitable relief sought." United States v. Local 359, United Seafood Workers, 1991 WL 230613, *2 (S.D.N.Y. Oct. 24 1991). For example, in United States v. District Council of New York City and Vicinity of United Brhd. of Carpenters and Joiners of America, 778 F. Supp. 738 (S.D.N.Y. 1991), the court refused to dismiss the District Council from the complaint, holding that "the District Council is properly included as a nominal defendant because it would be necessary to effectuate the relief sought by the government." 778 F. Supp. at 756 (citing both Fed. R. Civ. P. 19(a) and United States v. Local 560, Int'l Brhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984), aff'd, 780 F.2d 267 (3d Cir.1985), cert. denied, 476 U.S. 1140 (1986)). Likewise, in Local 359, 1991 WL 230613, the court found that the government was "substantially justified" in naming union funds as defendants. The funds themselves had not been accused of any wrongdoing, but the government argued, and the court agreed, that they were proper defendants because the government sought equitable relief that would affect them, namely the removal of certain trustees. 1991 WL 230613 at *2-3. See also United States v. ILA Local 1814, 1993 WL 330578, *1 n.2 (S.D.N.Y. Jan. 14 1993) (noting that union locals, waterfront employers, and employers' organizations were not named as RICO violators, but as "nominal defendants in order to effectuate complete relief"); United States v. Int'l Brh'd of Teamsters, 708 F. Supp. 1388, 1401-02 (S.D.N.Y. 1989) (withholding ruling as to whether Executive Board was a "person" under RICO, but noting that it was named as a nominal defendant for the purpose of facilitating an adequate remedy). Even if the court could enforce equitable relief against a non-party, see FED. R. CIV. P. 65 (injunctions binding upon parties and "upon those persons in active concert or participation with them who receive actual notice of the order"), such an approach would appear to invite litigation regarding the non-party's relationship with the named Defendants and whether the non-party's interests were adequately represented. In short, the ILA, MILA, and the METRO Defendants are proper parties to this litigation, and their arguments should be summarily rejected.

B. Relief Against METRO and the METRO-ILA Funds

METRO boldly asserts that it is "unprecedented" to seek relief against ERISA funds and that such relief is unnecessary in light of ERISA's comprehensive regulatory scheme. METRO Defendants Mem. at 21, 23. These arguments are not only beside the point, but flat-out inaccurate. Naming employee benefit plan trust funds as nominal Defendants for purposes of effecting relief is appropriate where the racketeering Defendants, while serving in capacities with the trust funds, allegedly agreed to commit racketeering crimes against the funds, as in this case.[41]

First, commentators have concluded that there are good reasons for awarding relief which permits the oversight of trust funds by court-appointed officers of the sponsoring labor unions where the funds and their participants are victims of the alleged racketeering crimes. See James B. Jacobs, The RICO Trusteeships After Twenty Years: A Progress Report, 19 Lab. Law. 419, 430

[41] Notably, racketeering Defendant Daggett, although no longer a trustee of the defendant funds, could resume his position at any time.

(2004) ("For example, in the Mason Tenders District Council case, the Monitor filed lawsuits against former officers and trustees, recovering $12 million of the $15 million in assets lost due to their malfeasance. . . . [T]he trustee over IBT Local 851, also recovered money for that local. These two cases strongly suggest that every trustee should have the authority to sue those who have victimized the union and its pension and welfare funds. Such suits enable the trustee to gain credibility with the rank-and-file"). Here, of course, there is no dispute that the ILA, MILA and the METRO-Funds have been victimized. In Gotti, Frank Scollo, former ILA Vice President, and Gambino capo Sonny Ciccone (also a former ILA official) and other Gambino family members and associates were convicted of many of the racketeering acts alleged in the Complaint, including acts directly affecting the operation and administration of the ILA and MILA. See SAC ¶¶ 50, 63, 118, 120, 124, 126, 137, 137, 181, 183, 187, 198. Similarly, Genovese soldier, former METRO officer and METRO-ILA Fund Trustee, Pasquale Falcetti, was convicted, with other Genovese family members, for, *inter alia*, his efforts to secure a kickback in exchange for the placement of an investment advisor with the METRO-ILA Funds. See SAC ¶¶ 42-48, 62. In 2003, Southern District of New York Judge Martin expressly found that the ILA's efforts to address corruption were "less than impressive" and that he had no reason to believe that the ILA's so-called reform efforts belied a "genuine concern for the welfare of the Union's members or a desire to rid the Union of organized crime's influence." SAC ¶ 64a. Just two years later, former ILA Executive Vice President Albert Cernadas pleaded guilty to mail and wire fraud relating to MILA's award of important welfare benefits contracts. SAC ¶ 70. These convictions, only the most recent in the decades-long history of corruption within the ranks of the ILA and mob domination of the Waterfront, evidence the need for the requested relief and more than satisfy the pleading requirements under the Federal Rules of Civil Procedure.

Second, the cases cited by the Defendants, holding that "victim" trust funds could not be charged as racketeering Defendants, are irrelevant as to whether such funds are properly named as Defendants. These cases primarily focus on why the benefit trust funds in those cases could not be held vicariously responsible for the racketeering acts of their agents. In fact, in Local 560, despite the lack of culpability on the part of the organizations themselves, the Court was persuaded to retain the union (the primary focus of the Local 560 civil RICO action) as a defendant. The Court explained:

> I have additionally determined to exculpate the institutional defendants herein, specifically Local 560 itself and its Funds and Plan. In order to attribute the misconduct of the individual defendants to these institutional defendants, I must find (1) that the individual defendants committed the acts of racketeering in the scope of their employment, and (2) that they thereby intended to advance the affairs of the institutional defendants. While it is clear that the individual defendants acted within the scope of their employment in committing the various criminal acts previously recited, it is equally obvious that their intent was not to advance the affairs of their employers. To the contrary, the institutional defendants in this action were the victims. The associates of the Provenzano Group, aided and abetted by the other defendants herein, intended by their actions to control and exploit Local 560 to its detriment. I therefore conclude that there is no basis for retaining either Local 560, the Funds or the Plan as a defendant in this action, except insofar as it is necessary to retain Local 560 as a nominal defendant to effectuate the equitable relief heretofore specified and as may be ordered in the future.

581 F. Supp. at 283 (internal quotations omitted).

Third, this case is hardly "unprecedented" as the United States has named other ERISA funds in other civil RICO actions. See, e.g. Local 359, 1991 WL 230613 at *2. The METRO Defendants' efforts to distinguish those cases by arguing that the funds' supervision resulted from negotiated consent decrees, rather than as the result of contested litigation, is not justification for rejecting the Funds' retention as nominal Defendants here. Those negotiated civil RICO cases started out just as this case has, with a complaint seeking oversight of the funds or naming them as a defendant.

Finally, the claims for relief in this civil RICO action are based on more than crimes affecting the mere administration of the trust funds in violation of ERISA. Instead, the object of the Waterfront Enterprise alleged in this case also includes the commission of crimes involving the criminal surrender of fiduciary loyalty and organized crime's concomitant seizure of plan participants' ERISA-guaranteed rights. Indeed, the Complaint alleges an agreement to defraud the METRO Funds and their participants of the fiduciary loyalty of the defendant trustees and plan administrators in the manner upheld by this court in United States v. Coffey, 361 F. Supp. 2d 102 (E.D.N.Y. 2005). SAC ¶¶ 224-67. There, the Court found the allegation that the Funds and their beneficiaries "were deprived of the following: (a) the right to the honest services of the defendants, union officials, purportedly acting as fund trustees, and (b) the Funds' right to control expenditures without the influence of any mafia connections" set forth a chargeable offense. 361 F. Supp. 2d at 118-119. The Court rejected the argument that the indictment did not sufficiently allege an actual or potential harm to the plans under the "honest services" portion of the charged mail and wire fraud scheme, and noted that a right to honest services could be found in ERISA. Id. at 117 n. 14 (noting that as officers and directors of the benefit plan funds, the defendants owed the plans a fiduciary duty set forth in ERISA, "including discharging their responsibilities for the best interests of the Funds and without a conflict of interest") (citing 29 U.S.C. §§ 1101, 1104, and 1106).

In Coffey, this Court also explained how the alleged scheme not only had the effect of defrauding the ERISA trust funds of property, but also the very process by which union officials were selected and appointed. According to the Court, the indictment sufficiently charged an honest service fraud based on ERISA prohibited transactions because:

> Defendants, on behalf of the Funds, are alleged to have received as a 'kickback' lucrative union positions in return for granting certain service contracts to entities controlled by organized crime . . . [and] to have withheld their connections to the mafia from the ILA and the Funds when they 'secretly' orchestrated for contracts entered into by the Funds to be awarded to entities with mafia connections.

361 F. Supp. 2d at 118 n.15. Consequently, contrary to the Defendants' arguments that ERISA is sufficient to police their future operations, the racketeering Defendants' conduct alleged in the Complaint goes beyond the scope of civil relief available under ERISA relating to the administration of the plan and its assets. Instead, the retention of the trust funds as Defendants in this action is crucial because the racketeering conspiracy not only involved them but also sought to corrupt the very process by which they and their union sponsor were maintained and operated.

CONCLUSION

For the reasons stated herein, the Defendants' motions should be denied in their entirety.

Dated: Brooklyn, New York
May 16, 2008

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